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IN THE

SUPREME COURT OF THE UNITED STATES

Term,

LOUIS AND JACQUELINE H. TUCKER, h/w AND
CHRISTINA TUCKER, by her parents and guardians
LOUIS AND JACQUELINE H. TUCKER
Petitioners

v.

THE AMBASSADOR BEACH HOTEL,
THE HOTEL CORPORATION
OF THE BAHAMAS,
WHITAKER TRAVEL, LTD.,
APPLE TOURS AND HAPPY TRAILS STABLES
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

1. To which party did Congress assign the burden of proving sovereign immunity on Foreign Sovereign Immunities Act claims?

2. What jurisdictional test did Congress intend courts to use when applying Clause One of Seciton 1605(a)(2) of the Foreign Sovereign Immunities Act?

3. Did Congress intend the "direct effect" phrase of Clause Three of Section 1605(a)(2) of the Foreign Sovereign Immunities Act to grant Federal Court access to corporations and not natural persons?

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Petitioners petition this Court to issue a writ of certiorari to review the judgments of the Supreme Court of Pennsylvania in this case.

OPINIONS BELOW

The Supreme Court of Pennsylvania's denial of Plaintiffs' Petition for Allowance of Appeal is unpublished but is reproduced in Appendix A and B. The Superior Court panel decisions are reproduced in Appendix C and E. The Court of Common Pleas' opinions are reproduced in Appendix G and J.

JURISDICTIONAL STATEMENT

The order denying Plaintiffs' Petitions for Allowance of Appeal was entered on October 2, 1986. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §1603 provides in pertinent part:

> (d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.
>
> (e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. §1605 provides in pertinent part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case —
>
> > (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

STATEMENT OF THE CASE

Plaintiffs Louis, Jacqueline and Christina Tucker brought these two actions against the various defendants for damages as a result of personal injuries which Jacqueline and Christina sustained in a horseback riding accident in the Bahamas on December 4, 1982.

Plaintiff Jacqueline Tucker and Christina Tucker, one of her six daughters, purchased an Apple Tour package trip to the Bahamas from Whitaker Travel Agency in Philadelphia during November, 1982. Both women had seen Bahamian vacation advertisements and were interested in going to the Commonwealth in order to participate in a variety of promoted activities that included horseback riding.

Whitaker Travel Agency presented Jacqueline and Christina Tucker with a Final Itinerary for their trip prior to the women's flight from Philadelphia to Nassau. This Itinerary advised the women that they would stay at the Ambassador Beach Hotel.

The Defendant Hotel Corporation of the Bahamas is a governmental subsidiary which owns the Ambassador Beach Hotel (See Appendix K). *The Hotel Corporation had a contractual arrangement with Defendant Apple Tours whereby the Hotel Corporation agreed to supply rooms and services to Apple Tours customers.* Apple Tours advertised the Ambassador Beach Hotel in its brochures.

Jacqueline and Christina Tucker flew from Philadelphia to Nassau on December 2, 1982 and were transported to the Ambassador Beach Hotel by Apple Tours' local representative.

Apple Tours gathered the members of its tour in a room at the Ambassador and a woman named "Ruth" told the tourists that she was their Apple Tour representative. Ruth wore an Apple Tour identification badge and she required each tourist to complete an Ambassador Beach Hotel registration card. Ruth then advised the assembled tourists to visit her at the Apple Tour courtesy desk in the Ambassador Beach Hotel lobby should any of them need help.

On December 4, 1982, the Tuckers wished to go horseback riding so Ruth of Apple Tours sought and engaged Happy Trails stables. Jacqueline Tucker paid two three dollar ($3.00) fees for herself and Christina to Ruth. Ruth advised Jacqueline Tucker to pay an additional fifteen dollars ($15.00) to the Happy Trails Stables. Happy Trails Stables' brochure was displayed throughout the Ambassador Beach Hotel at this time.

Happy Trails Stables' service van transported Jacqueline and Christina Tucker and two other young ladies to the riding stables in the early afternoon on December 4, 1982. All four guests advised the stable attendant that they were inexperienced riders and requested that the horses be walked.

Near the end of the ride the stable guide who had been leading the group fell off his horse. The guide's horse then broke into a gallop so the other four horses broke into a gallop and threw their respective riders. All four women were injured and received medical treatment. One of the two other young ladies eventually died as a result of head injuries.

Jacqueline Tucker continues to suffer pain from her disabling injuries. Christina Tucker sustained severe head injuries which caused paralysis, permanent eyesight impairment, permanent impairment of speaking ability and permanent traumatical epilepsy.

The Plaintiffs commenced two actions in the Philadelphia County Court of Common Pleas: one against the Ambassador Beach Hotel and the other against the Hotel Corporation of the Bahamas in the fall of 1983. The Defendant Hotel Corporation filed preliminary objections in both actions and filed a motion for a protective order in the second action.

The Lower Court granted the Defendant's preliminary objections which resulted in the dismissal of the Plaintiff's two actions. (Appendix J) The Lower Court also granted the Defendant's motion for a protective order regarding discovery in the second action. (Appendix I) The two actions were later consolidated for Appeal during the Spring of 1984.

The dismissal of this lawsuit is especially troubling in light of documented proof of defendants Hotel and Ambassador's misrepresentation to the courts of Pennsylvania. The defendants have denied through Preliminary Objections that they regularly conduct business in the United States with Apple or any other tour companies. Yet, after-discovered evidence (the subject of a companion petition) conclusively proves that the Hotel does business in the United States and also uses the courts of the United States. (See, *The Hotel Corporation of the Bahamas t/a the Ambassador Beach Hotel vs. Sigler Travel Service*, Philadelphia February Term, 1981, NO. 1595.) The Preliminary Objections did not contain a notice to plead nor a verification, yet the lower court did *not* conduct an evidentiary hearing upon averment of "facts" contained in those Preliminary Objections. Moreover, the Preliminary Objections were sustained without leave to conduct discovery on the issue of Jurisdiction.

Through discovery in the Federal action filed against the Bahamian Government (*Tucker v. Whitaker et al.* 620 F. Supp. 578), Plaintiffs learned that the Hotel Corporation had given false answers to discovery requests in the Plaintiffs' first Philadelphia Common Pleas action and had also concealed contracts and correspondence with Apple Tours.

Plaintiffs learned through review of four separate actions filed in Dade County, Florida that defendant Hotel Corporation has concealed extensive business practices in the United States.

On October 5, 1984, the Plaintiffs filed a petition with the Superior Court to introduce on the record *after-discovered* evidence of the Hotel Corporation's concealment of evidence regarding its U.S. business practices. (Appendix H)

The Superior Court remanded the action to the Lower Court on December 20, 1984. (Appendix H)

The Lower Court ruled on February 6, 1985 that the Court records and concealed evidence were for the "most part hearsay" and it entered a protective order to prevent the Plaintiffs from further discovery regarding Hotel Corporation's business dealings in the U.S. (Appendix G)

On March 5, 1985 the Plaintiffs filed an appeal from the Lower Court's ruling of February 6, 1985.

Plaintiffs attempted to consolidate their appeals but the Superior Court rejected their consolidation effort before oral argument. (Appendix F)

On April 17, 1985 oral argument was heard on the first appeal. Judge Wickersham of the Superior Court issued his opinion on October 18, 1985 which sustained the trial court dismissal. (Appendix E)

Plaintiffs then filed a petition for an *en banc* rehearing before the Superior Court of Pennsylvania regarding the October 18, 1985 Opinion but this petition was denied on December 26, 1985. (Appendix D)

On September 15, 1985 oral argument was heard on the second appeal regarding the February 6, 1985 Lower Court ruling. Judge Wieand of the Superior Court ruled on December 30, 1985 that the second panel would not consider the issues of the second appeal because the first panel had already sustained the Lower Court's determination that it did not have jurisdiction over this matter. (Appendix C)

The Plaintiffs then filed separate petitions for Allowance of Appeal to the Pennsylvania Supreme Court from the decisions of each panel. On October 2, 1986 the Pennsylvania Supreme Court denied each of the appeal petitions. (Appendix A and B).

REASONS FOR GRANTING PETITION

I. CONGRESS ENACTED THE FSIA SO THAT PLAINTIFFS INJURED ABROAD COULD SUE FOREIGN ENTITIES IN FEDERAL COURTS AND CONGRESS PLACED THE BURDEN OF PROVING SOVEREIGN IMMUNITY UPON FOREIGN DEFENDANTS

Congress enacted the Foreign Sovereign Immunities Act (hereinafter "FSIA") in 1976 so that citizens would have redress against foreign states in the United States courts. Since the advent of the United States, foreign states have used the concept of sovereign immunity as a shield against lawsuits in the United States.

When this Court was first presented with a sovereign immunity question in 1812, there were no statutory guideposts for Chief Justice John Marshall and his colleagues. Instead, the Supreme Court had to rely on general principles of national sovereignty.

In *The Exchange v. M'Faddon*, 11 U.S. (7 Cranch) 116 (1812), French sailors pirated a Baltimore merchant ship and armed the vessel on the high seas. Less than a year later, the French captain sailed the ship into port at Philadelphia. The original owners of the ship learned of its whereabouts and filed an attachment suit in federal district court.

Because the Madison administration was attempting to steer clear of the warring coalitions of both Great Britain and France at this time, the matter presented a difficult political and legal problem. After the district court dismissed the merchants' action on October 4, 1811, the circuit court reversed on October 28, 1811. The matter then came before the Supreme Court.

Attorney General Pinkney argued that the merchants' attempt at suing Napoleon's government should be decided by the executive branch rather than the judicial:

> When wrongs are inflicted by one nation upon another, in tempestuous times, they cannot be redressed by the judicial department. . . . [t]he right to demand redress belongs to the executive department,

> which alone represents the sovereignty of the nation in its intercourse with other nations . . . the statutes of the U.S., are in hostility to the idea of jurisdiction." *The Exchange v. M'Faddon, supra. p. 132-33.*

Chief Justice Marshall reviewed the evidence and relevant law and concluded that the court found it necessary to "rely much on general principles" because the Court was "exploring an unbeaten path" when considering whether an American citizen could sue a foreign state. *The Exchange v. M'Faddon, supra.* p. 135. The Chief Justice decided that he had to rule in favor of sovereign immunity but he said that "the questions to which such wrongs give birth are rather questions of *policy* [emphasis added] than of law, that they are for diplomatic, rather than legal discussion, are of great weight and merit serious attention." *"The Exchange v. M'Faddon, supra.* p. 146.

As this Court recently observed in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486, 76 L.Ed.2d, 81, 87, 103 S.Ct. 1962 (1983), Chief Justice Marshall concluded in *The Exchange* that the "United States had impliedly waived jurisdiction over certain activities of foreign sovereigns." The *Verlinden* opinion also stated that "foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution." *supra.* p. 87

The *Verlinden* opinion then said that the Supreme Court had followed Chief Justice Marshall's advice in *The Exchange* over the years by consistently deferring "to the decisions of the political branches — in particular, those of the Executive Branch on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria, supra.* at p. 486.

Prior to 1952, the State Department would request immunity in suits filed against friendly foreign sovereigns such as plaintiffs' action. *Verlinden* 461 U.S. at 487. However, the "Tate letter" of that year announced that the United States had adopted the restrictive immunity doctrine of foreign sovereign immunity. *Verlinden* 461 U.S. at 488 Footnote 9

Under this new doctrine, a foreign state could use the shield of sovereign immunity only for its public acts, not its private commercial ones. When parties sue the United States in foreign court the doctrine is applied in the same fashion. *1976 U.S. Code and Congressional Adm. News* p. 6605.

Because the doctrine of restrictive immunity was not enacted into law, the Executive Branch had to assume the responsibility of deciding whether immunity would apply in a given action against a foreign state. As Congress analyzed in its commentary on the Foreign Sovereign Immunities Act, the State Department found itself in the "awkward position of a political institution trying to apply a legal standard to litigation already before the courts." *1976 U.S. Code and Congressional Adm. News* p. 6607. Additionally, the foreign state could decide to exert diplomatic pressure upon the Executive Branch in these situations and make it very difficult for the State Department to apply the "Tate letter" restrictive immunity criteria. *1976 U.S. Code and Cong. Adm. News*, p. 6607.

In order to remedy the problem of suits against foreign states or their commercial entities in federal courts, Congress enacted the FSIA in 1976 following an executive branch recommendation. *1976 U.S. Code and Cong. Adm. News* p. 6604

According to Congress, the FSIA would conform U.S. immunity practice to the method in other nations where the courts make all sovereign immunity decisions. *1976 U.S. Code and Cong. Adm. News* p. 6606. Congress said that the FSIA would: 1) codify the concept of restrictive immunity, 2) insure that the restrictive immunity doctrine was applied in U.S. courts 3) provide a statutory procedure for suing a foreign state *or its commercial entities* and thus obtain *in personam* jurisdiction and 4) provide remedies for the judgment creditor of a foreign state.

Despite these stated goals, the authors of the bill admitted that the FSIA would provide only very modest guidance to federal courts confronted with the immunity problem.[1]

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1. *Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary 94th Cong., 2nd Sess. 53 (1976) ("1976 Hearings") (testimony of Monroe Leigh, Legal Adviser, Department of State).*

The FSIA authors "decided to put faith in the U.S. courts"[2] although they were supposed to provide guidance to those courts.

When the FSIA became effective on January 9, 1977, claimants who wanted to sue foreign states and their commercial entities in federal court no longer had to wait upon the State Department to grant federal court jurisdiction by evaluating a foreign entity's immunity. Instead, the claimants had to wait upon a federal district court's application of their factual situation to the language of the FSIA.

Section 1603 of the FSIA supplies the definitions of a "foreign state" and its "agency or instrumentality." Section 1603(B)'s language accurately describes the defendant Hotel Corporation of the Bahamas "because this defendant is a separate legal person and is owned by a foreign state." (See Hotel Corporation of the Bahamas Act of 1974). (Appendix K)

Under Section 1604 of the FSIA, foreign states and their instrumentalities "shall be immune" from federal court jurisdiction unless Sections 1605-1607 of the FSIA provide otherwise. Federal distict courts usually focus their jurisdictional analyses on Section 1605 because Section 1606 defines the extent of liability and Section 1607 handles counterclaims. Section 1605 (titled "General exceptions to the jurisdictional immunity of a foreign state") attempts to guide district courts on the question of sovereign immunity.

Federal courts which have attempted to apply Section 1605 to sovereign immunity suits have encountered a statute which offers questionable guidance. Judge Kaufman of the Second Circuit noted that the FSIA causes confusion because it purports to decide the issues of sovereign immunity, subject matter jurisdiction and personal jurisdiction yet the statute seems "to make the answer to . . . subject matter jurisdiction" dispositive of all three questions. *Texas Trading and Milling Corporation v. Federal Republic of Nigeria* 647 F.2d 300, 306 (2nd Cir., 1981).

Congress stated that the foreign state or its instrumentality must bear "the ultimate burden" of proving that its actions were

2. Hearings on H.R. 11315 *supra*.

not commercial and thus entitled to sovereign immunity in the legislative history of the FSIA. *1976 U.S. Code and Cong. Adm. News* p. 6616. The Hotel Corporation of the Bahamas performs only private commercial services so the sovereign immunity "public or private commercial action" question is not an issue here.

Congress did say that sovereign immunity applies unless Sections 1605-07 stipulate otherwise so plaintiffs must find an exception to defendant's jurisdictional immunity in Section 1605 of the FSIA.

Congress placed the burden of proving sovereign immunity upon the foreign state or its instrumentality because it intended to restrict a foreign state's immunity and thereby provide "our citizens . . . . access to the courts in order to resolve ordinary legal disputes." *1976 U.S. Code and Cong. Adm. News* p. 6605. This court quoted the above congressional intention in *Verlinden* 461 U.S. at 490, 76 L.Ed 2d at 90, when evaluating the purpose of the FSIA.

Judge Tamm of the D.C. Circuit Court of Appeals stated that "in accordance with the restrictive view of sovereign immunity reflected in the FSIA, the inapplicability of these exceptions is upon the party claiming immunity." *Transamerican S.S. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir., 1985).

Placing the burden of proving immunity upon the foreign party accords with the FSIA purpose of codifying the doctrine of restrictive immunity. As Judge Kaufman of the Second Circuit said in *Texas Trading*:

> "Before the FSIA, plaintiffs enjoyed a broad right to bring suits against foreign states, subject only to State Department intervention and the presence of attachable assets. Congress in the FSIA certainly did not intend significantly to constrict jurisdiction; it intended to regularize it.
>
> *Texas Trading supra*
> 647 F.2d at 313

Neither of the two Superior Court of Pennsylvania opinions discussed the defendant Hotel Corporation of the Bahamas burden of proving sovereign immunity under the FSIA. (Appendices C & E).

Under Section 1605 of the FSIA, can the defendant Hotel Corporation of the Bahamas carry the burden of proving sovereign immunity and thus deny the plaintiffs' claims?

Plaintiffs' action is based upon defendant Hotel Corporation of the Bahamas "commercial activity" so section 1605(a)(2) is the relevant provision.

28 U.S.C. §1605 provides in pertinent part:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or the States in any case
>
> > (1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver.
> >
> > (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

As the House Report on the FSIA stated, "Section 1605(a)(2) treats what is probably the most important instance in which foreign states are denied immunity, that in which the foreign state engages in a commercial activity." *1976 U.S. Code and Cong. Adm. News.* p. 6617. Courts applying Section 1605(a)(2) must look to Section 1603 for definitions of "commercial activity" and "commercial activity in the United States":

"(d) A commercial activity means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) "commercial activity carried on in the United States by a foreign state means commercial activity carried on by such state and having substantial contact with the United States."

Although Congress did not define the word "commercial", House Report 94-187 did say that "if an activity is customarily carried on for profit, its commercial nature could readily be assumed" *1976 U.S. Code and Cong. Adm. News* p. 6615.

As Judge Kaufman said in *Texas Trading supra*. p. 308, phrases such as "regular course of [commercial] conduct" seem to authorize courts to cast the net wide and to identify a broad series of acts as the relevant set of activities." *Texas Trading and Milling Co. v. Federal Republic of Nigeria, supra* p. 308.

Judge Wickersham's Superior Court opinion said that the defendant Hotel Corporation "may indeed conduct commercial activitv in the United States" but he decided that Section 1605(a)(2) did not deny jurisdictional immunity to the Hotel Corporation because "none of the three exceptions . . . [were] applicable to the instant case." (Appendix E)

In the second Superior Court per curiam opinion, the panel agreed with Judge Wickersham's conclusion that none of the three exceptions to the jurisdictional immunity granted to foreign states under the FSIA are applicable." (Appendix C)

Both courts failed to place the burden of proving jurisdictional immunity upon the defendant Hotel Corporation of the Bahamas. This procedural failure directly violates the legislative intent of the FSIA which is to deny jurisdictional immunity whenever a foreign party's commercial acts are at issue.

Following the plaintiff's suit against a foreign party, Congress says that the defendant must produce evidence in order to

"establish that a foreign state or one of its . . . . . instrumentalities is the defendant . . . and that the plaintiffs' claim relates to a public act" outside the ambit of Sections 1605-1607. *U.S. Code Cong. and Ad. News* p. 6616. The Superior Court of Pennsylvania and the Philadelphia County Court of Common Pleas should have required the defendant Hotel Corporation to produce "prima facie evidence" of immunity because "the ultimate burden of proving immunity would rest with the foreign state" *U.S. Code Cong. and Ad. News* p. 6616.

Further the courts failed to consider the impact of the Bahamian Act creating the Hotel Corporation which asserts that the Hotel Corporation "shall be a body corporate with the power to sue and be sued in its corporate name. . ." (Sec. 3-1-1) (Appendix K). Such a provision has been viewed as a waiver immunity. (*First National City Bank vs. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 625 (1983)). Finally, the Courts of Pennsylvania overlooked the fact that the Hotel Corporation had previously used the courts of Philadelphia County and such a use of a jurisdiction's Courts has also been viewed as a waiver of immunity. (*First National City Bank v. Banco Para El Comercio Exterior De Cuba*, supra. 632.)

Defendant Hotel Corporation of the Bahamas has yet to offer any evidence which would allow it to use jurisdictionai immunity under the provisions of Section 1605. Although the Hotel Corporation has claimed sovereign immunity, the defendant has yet to offer any evidence which supports its claim. Therefore, the Superior Court and the Court of Common Pleas did not properly adjudicate the plaintiff's cause of action against the defendant Hotel Corporation of the Bahamas.

II. CONGRESS INTENDED A WIDE JURISDICTIONAL SWEEP FOR CLAUSE ONE OF SECTION 1605 (A) (2) SO COURTS SHOULD APPLY A "DOING BUSINESS" OR "SUBSTANTIAL CONTACT" JURISDICTIONAL TEST FOR ALL CLAUSE ONE CLAIMS

Plaintiffs submit that they have presented a valid cause of action under Clause One of Section 1605(a)(2) of the FSIA.

Plaintiffs' action "is based upon a commercial activity" which the defendant Hotel Corporation has carried on in the United States. The defendant has advertised extensively in the United States in order to lure people such as Christina and Jacqueline Tucker to their hotels in the Bahamas. Plaintiffs have premised their lawsuit on the defendants' commercial activities.

Both the trial court and the second Superior Court panel gave no reasons for denying FSIA jurisdiction to plaintiffs' Clause One cause of action. (Appendices C & J) Only Judge Wickersham's opinion addressed the issue of whether the Tucker's action was within the jurisdictional scope of Clause One of Section 1605(a)(2) of the FSIA.

> While appellees may indeed conduct commercial activity in the United States, it is clear that appellants' (plaintiffs') cause of action is not *based upon* . . . any commercial activity carried on in the United States. Rather, appellants' suit is based upon the alleged negligence of appellees in the Commonwealth of the Bahamas. Thus the first clause . . . is inapplicable . . . (Appendix E).

Judge Wickersham cited two district court decisions to support his opinion that "any nexus between . . . (defendant's commercial) activity and appellants' cause of action is too attenuated to satisfy the first clause of §1605." (Appendix E) These cases are *Tigchon v. Island of Jamaica*, 591 F. Supp. 765 (W.D. Mich. 1984) and *Harris v. VAO Intourist, Moscow*, 481 F. Supp. 1056 (E.D.N.Y. 1979).

In *Tigchon* the district court denied the plaintiff's attempt to gain Clause One jurisdiction because the links between Jamaica's tourist activity and the plaintiff's water-skiing death in that nation were "too attenuated and indirect to satisfy the first clause of Section 1605". Judge Wickersham analyzed the holding to mean that Tigchon's action was not "based upon substantial contacts with the United States." *Tigchon* supra. at p. 767.

According to the *Harris* court, Clause One "requires that the court action be based upon the specific commercial activity carried on in the United States." *Harris supra*. p. 1061.

After directly quoting the FSIA language in Clause One the Harris court then decided that "the relationship between the (defendant's) negligent operation of the Hotel . . . and any activity in the United States [was] *so attenuated* (emphasis added) that Clause One was not applicable". *Harris supra*. p. 1061. The court directly rejected a "doing business" jurisdictional test for Clause One. *Harris* p. 1060-61.

Even through Congress said that "the ultimate burden of proving immunity" rests with the foreign party, *U.S. Code Cong. and Ad. News* p. 6616, neither court considered whether the respective defendants in *Tigchon* and *Harris* proved that Clause One denied jurisdiction to the plaintiffs' claims. Judge Wickersham's opinion also did not discuss whether the defendant Hotel Corporation carried its burden of proving jurisdictional immunity under Clause One.

Because the phrase "based upon" does not describe a clear jurisdictional test for Clause One of Section 1605(a)(2), this court needs to settle this question of federal law.

The various Circuit Courts have adopted conflicting tests for this issue and state courts have reflected the federal confusion in cases such as the present one.

Because other plaintiffs will continue to file state and federal actions against foreign states which engage in a "regular course of commercial conduct" in the United States, this Court should delineate the proper jurisdictional scope of Clause One.

Plaintiffs submit that the FSIA's legislative purpose is to allow U.S. citizens to sue foreign entities in federal courts whenever the foreign parties' commercial activities are involved.

Because the FSIA describes "commercial activity . . . in the United States" as being activity which has "substantial contact" with the United States 28 U.S.C. 1603(e), the "substantial contact" jurisdictional test seems to be ideal for determining the scope of Clause One.

Additionally, the "doing business" test appears to be a natural for Clause One because American courts use that standard as a guideline when deciding to subject a business entity to out-of-state court jurisdiction. We have an analogous situation under

Clause One because the plaintiffs wish to sue the foreign defendant Hotel Corporation in the state courts of Pennsylvania.

If this Court does not adopt a clear jurisdictional test for Clause One such as "minimum contacts" or "doing business", confusion will continue to reign in the federal courts and in the state courts which look to the federal tribunals for guidance on matters such as the FSIA.

Both Judge Kaufman and Judge Friendly of the Second Circuit have written opinions which used the "substantial contact" jurisdictional test for Clause One because they felt that this test was in accord with the FSIA's legislative purpose.

After reviewing the legislative history of the FSIA in *Gemini Shipping Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs* 647 F.2d 317 (2nd Cir. 1981), Judge Kaufman rejected a narrow interpretation of the Clause One phrase "based upon commercial activity" because the FSIA authors intended "no such niggardly construction." He noted the wide sweep of the phrase "commercial activity" as defined in Section 1603 and said that "the 'substantial contact' standard of §1603(e) can be satisfied by as little activity as receiv[ing] financing from a private or public lending institution located in the United States." *Gemini supra*. p. 319.

Referring to Sections 1603 (D) and (E), Judge Friendly said in *Ministry of Supply, Cairo v. Universe Tankships* 708 F.2d 80, 84 (2nd Cir. 1983) that Clause One "withdraws immunity" with respect to acts within and outside the United States if the acts "comprise an integral part of the state's regular course of commercial conduct . . . having substantial contact with the United States."

Judge Wilkey of the D.C. Circuit approved of Judge Kaufman's liberal construction of the Clause One "based upon" phrase when he wrote the opinion in *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1028 (D.C. Cir. 1982). Noting that the three clauses of Section 1605(a)(2) "are intended to carve out a commercial act exception" to the foreign party's sovereign immunity, Judge Wilkey offered a test which required the plaintiff to show either: (a) a direct casual connection between the foreign party's commercial activity in the U.S. and the actions which

caused plaintiff's claim or (b) that the commercial activity is an element of the cause of action and whatever law that governs the claim. *Gilson supra*. p. 1028.

Although the FSIA authors made no mention of a "nexus" requirement for Clause One claims, the Third Circuit has adopted the theory that Clause One "applies only if there is a nexus between the plaintiff's grievance and the sovereign's commercial activity." *Sugarman v. Aeromexico* 626 F.2d 270 (3rd Cir., 1980), *Velidor v. L/P/G Benghazi* 653 F.2d 812 (3rd Cir., 1981). When the federal district court reviewed the plaintiffs' companion case against the Bahamas and its Ministry of Tourism, the tribunal said that the relationship between the plaintiffs' injuries and the relevant defendants was "too attenuated" to satisfy the Clause One requirements. *Tucker v. Whitaker Travel*, 620 F. Supp. 578 p. 585 (E.D. Pa., 1986).

Plaintiffs submit that even if the Third Circuit uses a "nexus" test which has no basis under the legislative history, the claims in this case satisfy the "nexus" requirement. Defendant Hotel Corporation lured the Tucker women to its facility in the Bahamas by conducting extensive commercial activity in the United States. Plaintiffs' grievance concerns injuries which are directly related to the defendant Hotel Corporation's promotion of activities connected with its operations in the Bahamas. The defendant's promotion of such activities occurred in the United States and at defendant's facility in the Bahamas.

Following the lead of the Third Circuit, the Fifth Circuit Court of Appeals issued a *per curiam* opinion which adopted the "nexus" test for Clause One but this court also showed much interest in the "doing business" standard while deciding *Vencedora Oceania Novigacion v. Compagnie Nation*, 730 F.2d 195, (5th Cir. 1984). After the *Vencedora* court analyzed the "doing business" test proposed in *Rio Grande Transport Inc.*, 516 F. Supp. 1155 (S.D.N.Y. 1981), it tried to decide whether Judge Friendly's opinion in *Ministry of Supply, Cairo supra*. also endorsed the "doing business" standard for Clause One before finally settling on the "nexus" approach.

Judge Higginbotham's concurring and dissenting opinion in *Vencedora* supported the "doing business" test for Clause One claims. Judge Higginbotham acknowledged that using a "doing business" test in the determination of Clause One could present jurisdictional excesses but he felt that courts could remedy this problem by adhering to the *forum non conveniens* doctrine and by requiring "substantial" foreign party business contact with the United States. *Vencedora* supra. p. 205.

This court should adopt a clear jurisdictional standard that all federal and state courts can use when evaluating "based upon commercial activity" claims under Clause One of Section 1605(a)(2) of the FSIA. Although many courts seem concerned that the adoption of a "substantial contact" or "doing business" test will spawn an international court of claims, Congress did enact the FSIA in order to subject foreign governments or instrumentalities acting *commercially* (emphasis added) to American court jurisdiction.

Plaintiffs in this case have based their claims upon the defendant Hotel Corporation of the Bahamas' commercial activity both within and outside of the United States. Defendants' acts in the present case comprise an integral part of its regular course of commercial conduct (tourism) which has substantial contact with the United States. This defendant attracts the great majority of its business from the United States so the plaintiffs' Clause One claims would satisfy either a "doing business", "substantial contact" or a "nexus" test.

Subject matter jurisdiction exists over plaintiffs' Clause One claim because the action satisfies every possible FSIA requirement. Plaintiffs have properly served the defendant Hotel Corporation pursuant to 28 U.S.C. §1608 so personal jurisdiction also exists over the defendant.

Therefore, this Court should reverse the Orders of the Courts of Pennsylvania and remand this case to the Philadelphia County Court of Common Pleas for a complete litigation of the matters presented in plaintiffs' complaint.

III. NATURAL PERSONS WHO FILE PERSONAL INJURY AND DEATH CASES UNDER CLAUSE THREE'S "DIRECT EFFECT" PROVISION SHOULD RECEIVE THE SAME ACCESS TO FEDERAL COURTS AS CORPORATIONS.

Plaintiffs Christina and Jacqueline Tucker both were injured in the Bahamas in connection with the defendant Hotel Corporation of the Bahamas' tourist activities both within and outside of the United States. Plaintiffs' Clause Three action is premised upon the defendant Hotel Corporation's acts in the Bahamas which caused the injuries. Clause Three of Section 1605(a)(2) requires that the acts "cause a direct effect in the United States."

Plaintiffs submit that the injuries which Christina and Jacqueline Tucker sustained in the Bahamas continued to cause a direct effect when the two women returned to the United States. Furthermore, the injuries caused a direct financial loss to the plaintiffs due to large medical bills which the plaintiffs sustained upon Christina and Jacqueline's return to the United States.

The trial court dismissed the plaintiffs' complaint because he did not think that Christina and Jacqueline Tucker's injuries caused a "direct effect in the United States:

> "It is clear that the tortuous (*sic*.) act of the . . Hotel occurred in the Commonwealth of the Bahamas and did not occur in the United States. The fact that the plaintiffs relocated in . . . . Pennsylvania subsequent to their injuries, does not have a direct effect in the United States as defined in the Foreign Immunities Act of 1976." (Appendix J)

Both Superior Court opinions stated that Clause Three did not apply to the plaintiffs' action because the defendant Hotel Corporation's acts did not cause a "direct effect" in the United States (Appendices C & E)

Federal district courts which have confronted the situation of Americans injured abroad suing under Clause Three have adopted a curious posture. These courts have granted Clause

Three access to corporations when foreign entities have harmed the corporations' American financial assets but the same courts have denied Clause Three access to personal injury or death claimants such as the plaintiffs.

In *Texas Trading, supra*. p. 312-13 the Second Circuit allowed a cement supplier to sue the Nigerian government on an overseas contract breach because the supplier suffered a "direct" financial loss in the United States. Judge Kaufman's opinion said that courts which construe the phrase "direct effects" should be "mindful more of Congress' concern with providing access to the courts to those aggrieved by the commercial acts of a foreign sovereign." *Texas Trading, supra*. p. 313.

Judge Kaufman briefly considered two Clause Three personal injury/death cases in his *Texas Trading* opinion. In *Harris v. VAO Tourist, Moscow* 481 F. Supp. 1056 (E.D.N.Y 1979), an American citizen died in a Soviet hotel fire. *Upton v. Empire of Iran* 459 F. Supp. 264 (D.D.C. 1978) aff'd mem. 607 F.2d 494 (D.C. Cir. 1979) concerned a roof collapse upon American citizens waiting in the Tehran airport terminal. Judge Kaufman said that these plaintiffs "undoubtedly suffered 'direct' effects" but because "the injured parties . . . were natural persons, not corporations, it is easy to locate the 'effect' outside the United States." *Texas Trading supra*. p. 312 footnote 35.

In one paragraph Judge Kaufman moves a corporate plaintiff within the ambit of Clause Three and then his footnote at the bottom of the page denies Clause Three jurisdictional access to an American citizen.

Judge Brieant of the Southern District of New York noticed this unjust anomaly when he wrote an opinion about an American citizen who was injured by the jetwash of a foreign state's commercial aircraft at the Kingston, Jamaica airport. *Close v. American Airlines, Inc*. 587 Supp. 1062, 1065 (S.D.N.Y 1984). After noting Judge Kaufman's above footnote in *Texas Trading supra*. p. 312, the court felt constrained to follow the Second Circuit precedent:

> "That corporations injured in their American pocket books by commercial activities of state trading companies occurring outside the United States would enjoy greater access to the American courts than personal injury or death claimants similarly injured would seem on initial examination to present a somewhat anomalous statutory construction. Be that it as it may, in light of Texas Trading, supra., this court must follow *Harris* and *Upton*, without regard to its own view of what Congress intended." *Close* supra. at 1065.

Both Superior Court opinions in the present case used the *Close* and *Harris* cases as their prime authority for denying Clause Three jurisdiction to the plaintiffs. (Appendices C & E).

In the plaintiffs' companion federal action against the Commonwealth of the Bahamas, the Third Circuit said that the defendant's acts "causing injury to an American abroad" did not cause a "direct effect in the United States despite the fact that the injury continues to cause suffering." *Tucker v. Whitaker Travel, et al.* (Appendix L). The Third Circuit used its decision in *Sugarman v. Aeromexico* 626 F.2d 270 (3rd Cir., 1980) as authority for the holding in the Tuckers' federal action but the *Sugarman* opinion never explained why Clause Three jurisdiction did not apply. (Appendix L)

This Court needs to emphasize that the Clause Three "direct effect" provision is available to natural persons injured abroad. Although this court allowed a foreign corporation to sue a foreign government in federal district court under the FSIA in *Verlinden B.V v. Central Bank of Nigeria* 461 U.S. at 489, 76 L.Ed. at 89, 103 S.Ct. 1962, lower federal courts have completely denied federal court access to the American citizen who suffers physical, emotional and financial loss due to an injury abroad.

Congress hardly intended to deny federal court access to citizens injured abroad in connection with a foreign instrumentality's commercial activities when it wrote the FSIA:

> "At the hearings on the bill it was pointed out that American *citizens* are increasingly coming into contact with foreign states and entities owned by foreign states. These interactions arise in a variety of circumstances and they call into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes." *1976 U.S. Code Cong. and Ad. News p. 6605.*

When the district court denied Clause Three jurisdiction to the plaintiff in *Harris supra.* at 1065, it justified the decision by claiming that "Congress has given the courts little room to maneuver in a case such as the one now before us." Although Congress actually gave the federal courts wide latitude in evaluating FSIA claims (see Hearings on H.R. 11315 supra. p. 9 of text), this district court was unwilling to consider the FSIA purpose of granting federal court access to American citizens involved in legal disputes with foreign parties.

Using words very similar to Chief Justice Marshall's opinion in *The Exchange vs. M'Faddon supra.*, the *Harris* court handed the immunity dilemma back to the Congress:

> "The sensitive and difficult problems presented by possible conflicts between private rights and international comity are, under our constitution, peculiarly fitted for executive and legislative resolution. Responsiblity for any change in the statutory balance lies with Congress, not the courts." *Harris supra.* at 1065

Unlike the early nineteenth century, the federal courts do have *some* legislative guidance on jurisdictional immunity questions. Congress does write the laws of the United States and the Federal Courts interpret those laws. According to the Federalist No. 78, "the courts must declare the sense of the law".

Although the FSIA has provided federal courts "very modest guidance," the plaintiffs submit that the FSIA purposes

clearly suggest that American citizens should receive the same federal court access under Clause Three's "direct effect" provision that foreign corporations receive.

Plaintiffs have suffered "direct effects" through Christina and Jacqueline Tucker's medical bills and physical sufferings. These effects are as worthy of an FSIA claim for damages as the corporate monetary losses of those parties that courts have allowed to maintain Clause Three "direct effects" claims.

This Court spoke upon the practice of federal district court denial of FSIA jurisdiction in *Verlinden*:

> "Congress protected against this danger (of the courts becoming an international court of claims) not by restricting the class of potential plaintiffs, but rather by enacting substantive provisions requiring some form of substantial contact with the United States." *Verlinden* 461 U.S. at 490, 76 L. Ed. 2d at 90, 103 S. Ct. 1962

Plaintiffs have demonstrated that they have a claim under Clause Three of Section 1605(a)(2) of the FSIA. Defendant Hotel Corporation of the Bahamas has not submitted any evidence in order to carry its burden of proving the inapplicability of Clause Three of plaintiffs' action.

Defendant Hotel Corporation of the Bahamas cannot deny its substantial contact with the United States through its commercial activities and the defendant cannot deny that the plaintiffs suffered "direct effects" from the defendant's commercial acts in the Bahamas.

Plaintiffs have shown that FSIA subject matter jurisdiction exists over their cause of action because of Clause Three of Section 1605(a)(2). Because the plaintiffs also properly served the defendant pursuant to 28 U.S.C. 1608, personal jurisdiction exists over the defendant Hotel Corporation of the Bahamas.

Plaintiffs respectfully request that this Court reverse the Courts of Pennsylvania and remand this matter to the Philadelphia County Court of Common Pleas for a complete litigation of the issues.

CONCLUSION

For the reason stated above, plaintiffs, Louis and Jacqueline Tucker respectfully request that the Petition for Writ of Certiorari hereby presented be granted in their favor.

Respectfully submitted,

John J. O'Brien, Jr., Esquire
John J. O'Brien, III, Esquire
Daniel M. Gray, Esquire

APPENDIX

APPENDIX A

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 61 E.D. ALLOCATUR DOCKET 1986

LOUIS AND JACQUELINE TUCKER, et al.

Petitioner

v.

AMBASSADOR BEACH HOTEL, et al.

ORDER

October 2, 1986

Petition denied.

Per Curiam.

APPENDIX B

SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 79 E.D. ALLOCATUR DOCKET 1986

LOUIS AND JACQUELINE TUCKER, et al.

Petitioner

v.

AMBASSADOR BEACH HOTEL, et al.

ORDER

October 2, 1986

Petition denied.

Per Curiam.

APPENDIX C

LOUIS AND JACQUELINE TUCKER, H/W AND CHRISTINE TUCKER, BY HER PARENTS AND GUARDIANS, LOUIS AND JACQUELINE TUCKER, *Appellants*	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	
WHITAKER TRAVEL, LTD. AND APPLE TOURS, AND THE AMBASSADOR BEACH HOTEL AND HAPPY TRAILS STABLES	:	No. 00605 Philadelphia 1985
	:	No. 00606 Philadelphia 1985

APPEAL FROM THE ORDER ENTERED FEBRUARY 6, 1985 IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, CIVIL NO. 4638 JULY TERM, 1983

Before: WIEAND, CIRILLO, and ROBERTS, JJ.

PER CURIAM: FILED DEC. 30 1985

Order affirmed.

LOUIS AND JACQUELINE TUCKER, H/W AND CHRISTINE TUCKER, BY HER PARENTS AND GUARDIANS, LOUIS AND JACQUELINE TUCKER, *Appellants*	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	
WHITAKER TRAVEL, LTD. AND APPLE TOURS, AND THE AMBASSADOR BEACH HOTEL AND HAPPY TRAILS STABLES	:	No. 00605 Philadelphia 1985 No. 00606 Philadelphia 1985

APPEAL FROM THE ORDER ENTERED FEBRUARY 6, 1985 IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, CIVIL NO. 4638 JULY TERM, 1983

Before: WIEAND, CIRILLO, and ROBERTS, JJ.

MEMORANDUM:

This is an appeal from order of the Court of Common Pleas of Philadelphia County denying appellants' motion to introduce after-discovered evidence into the trial court record and granting appellee's motion to prohibit any further discovery. We affirm.

Louis and Jacqueline Tucker and their daughter Christine (appellants) brought this action to recover damages for injuries sustained by Jacqueline and Christine in a horseback riding accident that occurred in the Bahamas. In November, 1982, the Tuckers purchased an "Apple Tour" from the Whitaker Travel

Agency. Upon their arrival in the Bahamas on December 4, 1982, the Tuckers were taken to the Ambassador Beach Hotel where they were met by a representative of Apple Tours, the sponsor of the vacation. The representative arranged for Mrs. Tucker and her daughter to go horseback riding at the Happy Trails Stables. Together with two other women, they were driven to the stables in a van provided as a service of Happy Trails. All four advised the stable attendant that they were inexperienced riders and requested that they 'walk' the horses. Near the end of the ride, the guide fell off his horse, which then broke into a gallop. The other horses followed and threw their riders. Mrs. Tucker suffered disabling injuries. Christine sustained severe head injuries which caused permanent paralysis, impairment of her eyesight, impairment of her ability to speak, and traumatic epilepsy.

In July, 1983, the Tuckers filed a complaint against the Ambassador Beach Hotel, Apple Tours, and Happy Trails Stables. The Ambassador Beach Hotel filed preliminary objections alleging that is was owned by the Hotel Corporation of the Bahamas, which is an entity of the Bahamian Government and therefore immune from the jurisdiction of state courts pursuant to the Foreign Sovereign Immunities Act (hereinafter referred to as "FSIA"), 28 U.S.C. §§1601-1611. The trial court sustained the preliminary objections and dismissed the Tuckers' complaint as to the Ambassador Beach Hotel and the Hotel Corporation of the Bahamas (appellees). The Tuckers appealed all orders pertaining to the dismissal of the complaint. In May, 1984, the appeals were consolidated by this Court.

In October, 1984, prior to the consolidation of the appeals, the Tuckers initiated a new, but identical action naming as defendant "The Hotel Corporation of the Bahamas t/a the Ambassador Beach Hotel." The Tuckers also filed various petitions in this Court for leave to supplement the trial court record. In response to those petitions, this Court issued an order on December 20, 1984 remanding the appeals to the trial court to determine whether the court should include certain after-discovered evidence. After hearing oral arguments, the

trial court denied the Tuckers' motion to introduce the after-discovered evidence. A second order was entered prohibiting the Tuckers from seeking any further discovery. The Tuckers were then granted leave to appeal these orders.

On April 17, 1985, the consolidated appeals were argued before this Court. In an opinion by the Honorable Richard B. Wickersham, this Court affirmed the trial court's granting of the appellee's preliminary objections and the dismissal of the Tuckers complaint. *Tucker v. Whitaker Travel, Ltd., et al.*, Pa. Super. , A.2d (977, 1055, 1056, 1109, 1792 Phila. 1984, filed October 18, 1985).

In the instant appeal, appellants raise the following issues for our consideration:

> 1. Whether state courts have jurisdiction over foreign corporations of a foreign government when the claim arises from commercial activity in the United States.
>
> 2. Whether the Superior Court's remand order of December 20, 1984 with directions to the lower court to "enter its findings" renders a mere oral argument on the issues in controversy insufficient, as a full evidentiary hearing was required.
>
> 3. Whether pursuant to Pa.R.A.P. 1926, relevant after discovered judicial records and business records are properly subject to inclusion in the lower court record.

Inasmuch as this Court recently held that the State Court does not have jurisdiction over the Ambassador Beach Hotel and the Hotel Corporation of the Bahamas, we find it unnecessary to address appellants' second and third issues.

Under the Foreign Sovereign Immunities Act, foreign states and their agents are immune from the jurisdiction of federal and state courts in the United States unless a cause of action falls within one or more of the exceptions provided in the FSIA. The exceptions are enumerated in three clauses to Section 1605(a) of the Act:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case — in

> which the action is based upon a commercial activity carried on in the United States by the foreign state; [clause 1] or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; [clause 2] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States [clause 3].

Appellants contend that both the first and third clauses confer jurisdiction over the appellees. However, we agree with Judge Wickersham's conclusion in the first appeal that "none of the three exceptions to the jurisdictional immunity granted to foreign states under the FSIA are applicable to the instant case . . ." *Tucker, supra*.

The third clause was also found to be inapplicable. Although appellants' cause of action was based upon an act performed outside the United States in connection with a commercial activity of a foreign state elsewhere, it did not cause a *direct effect* in the United States. Personal injuries inflicted on Americans abroad do not have a direct effect in the United States simply because of economic loss to the American victim. *Close v. American Airlines*, 587 F.Supp. 1062 (S.D. N.Y. 1984); *See also Harris v. VAO Intourist, Moscow*, 481 F.Supp. 1056 (E.D. N.Y. 1979) (indirect injurious consequences within this country of an out-of-state act are not sufficient contacts to satisfy the 'direct effect' requirement of Section 1605(a)(2).

Since we recently found in the first appeal that none of the exceptions to the jurisdictional immunity granted to foreign states under the FSIA are applicable in the instant case, we also find that the trial court does not have jurisdiction over the appellees. Accordingly, the February, 1985 orders denying appellants' motion to introduce after-discovered evidence and granting appellee's motion to prohibit any further discovery were proper. In addition, the trial court properly dismissed appellants' complaint as to the appellees.

Order affirmed.

LOUIS AND JACQUELINE TUCKER, H/W AND CHRISTINE TUCKER, BY HER PARENTS AND GUARDIANS, LOUIS AND JACQUELINE TUCKER, *Appellants*	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	
WHITAKER TRAVEL, LTD. AND APPLE TOURS, AND THE AMBASSADOR BEACH HOTEL AND HAPPY TRAILS STABLES	:	No. 00605 Philadelphia 1985 No. 00606 Philadelphia 1985

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:
J. Haniel Henry
PROTHONOTARY

Dated: DECEMBER 30, 1985

APPENDIX D

LOUIS AND JACQUELINE TUCKER, H/W AND CHRISTINE TUCKER, BY HER PARENTS AND GUARDIANS, LOUIS AND JACQUELINE TUCKER, *Appellants*,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
WHITAKER TRAVEL, LTD., APPLE TOURS, THE AMBASSADOR BEACH HOTEL, HAPPY TRAILS STABLES, AND THE HOTEL CORPORATION OF THE BAHAMAS T/A THE AMBASSADOR BEACH HOTEL	:	Nos. 977, 1033, 1036, 1109 Philadelphia, 1984
LOUIS AND JACQUELINE TUCKER, H/W AND CHRISTINE TUCKER, BY HER PARENTS AND GUARDIANS, LOUIS AND JACQUELINE TUCKER, *Appellants*	:	
v.	:	
WHITAKER TRAVEL, LTD., APPLE TOURS, HAPPY TRAILS STABLES AND THE HOTEL CORPORATION OF THE BAHAMAS T/A THE AMBASSADOR BEACH HOTEL	:	No. 1792 Philadelphia, 1984

ORDER OF COURT

AND NOW, this 26th day of December, 1985, Appellants' Application for Reargument is denied.

Per Curiam.

APPENDIX E

LOUIS AND JACQUELINE TUCKER, H/W AND CHRISTINE TUCKER, BY HER PARENTS AND GUARDIANS, LOUIS AND JACQUELINE TUCKER, *Appellants*,	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
WHITAKER TRAVEL, LTD., AND APPLE TOURS, AND THE AMBASSADOR BEACH HOTEL, AND HAPPY TRAILS STABLES, AND THE HOTEL CORPORATION OF THE BAHAMAS T/A THE AMBASSADOR BEACH HOTEL	:	Nos. 977, 1055, 1056, 1109 Philadelphia, 1984

Appeal from the Orders of the Court of Common Pleas, Civil Division, of Philadelphia County at No. 4638 July Term 1983.

LOUIS AND JACQUELINE TUCKER, H/W AND CHRISTINE TUCKER, BY HER PARENTS AND GUARDIANS, LOUIS AND JACQUELINE TUCKER, *Appellants*	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
WHITAKER TRAVEL, LTD., AND APPLE TOURS AND HAPPY TRAILS STABLES AND THE HOTEL CORPORATION OF THE BAHAMAS T/A THE AMBASSADOR BEACH HOTEL	:	No. 1792 Philadelphia, 1984

Appeal from the Orders of the Court of Common Pleas, Civil Division, of Philadelphia County at No. 4665 October Term 1983.

Before: WICKERSHAM, BECK and CERCONE, JJ.

OPINION BY WICKERSHAM, J.:

Louis and Jacqueline Tucker and their daughter, Christine, brought this action to recover damages for injuries sustained by Jacqueline and Christine on December 4, 1982, in a horseback riding accident that occurred in the Bahamas.

Appellants set forth the circumstances that led to the accident as follows:

> During November, 1982, [Appellants], Jacqueline and Christine Tucker purchased an "Apple Tour" to the Bahamas. The brochure for the tour stated, "Your choice of three or four nights at any of our three excellent Hotels." One of the three hotels is the Ambassador Beach Hotel. The brochure also stated, "A hospitality desk will be available at the Ambassador Beach Hotel."
>
> Upon their arrival in the Bahamas, the Tuckers were taken to the Ambassador Beach Hotel, as they were advised by the Final Itinerary given to them by Whitaker Travel.
>
> All the members of the Apple Tour were gathered in a room where they were addressed by a woman who identified herself as "Ruth". Ruth wore an Apple Tour identification badge and informed the group that she was their Apple Tour representative.
>
> Ruth required that all individuals present fill out registration cards for the Ambassador Beach Hotel. Ruth also advised the assembled group that if anyone needed anything they were to see her at the courtesy desk provided by Apple Tours in the Ambassador Beach Hotel.
>
> The Tuckers wished to go horseback riding and Ruth sought and engaged a stable for the Tuckers. Mrs. Tucker paid Ruth three dollars ($3.00) for herself and her daughter. She was advised to pay fifteen dollars ($15.00) to the stables.

> The Tuckers were transported to the riding stables together with two other young ladies in the stable's service van.
>
> All four advised the stable attendant that they were inexperienced riders and requested that they simply walk the horses. Near the end of the ride the guide fell off his horse and the horses broke off into a gallop. The other four horses followed and threw their riders. All four women were injured and all four received medical treatment. One rider died of head injuries. Mrs. Tucker continues to suffer pain from her disabling injuries. Christine Tucker sustained severe head injury causing paralysis, impairment of eyesight, impairment of ability to speak and traumatical-epilepsy; all of which is permanent.

Brief for Appellants at 8-10.

Appellants brought this action against a variety of defendants including appellees herein, the Ambassador Beach Hotel and the Hotel Corporation of the Bahamas.[1] Both of these defendants filed preliminary objections to appellants' complaint, alleging that they were immune from the jurisdiction of the court under the Foreign Sovereign Immunities Act of 1976 [hereinafter referred to as "FSIA"], 28 U.S.C. §§ 1602-1611. The court below granted the appellees' preliminary objections and dismissed appellants' complaint as to the Ambassador Beach Hotel and the Hotel Corporation of the Bahamas. Appellants then filed the instant appeal.[2]

The Ambassador Beach Hotel is owned and operated by the Hotel Corporation of the Bahamas. The Hotel Corporation, in turn, is a corporate entity established by the Bahamian Legislature and created and owned in full by the Commonwealth of the Bahamas, *See* The Hotel Corporation of the Bahamas Act, 1974; Act No. 20 of 1974. It is clear, therefore, that appellees are "agencies or instrumentalities" of a foreign state entitled to invoke the provisions of the FSIA. 28 U.S.C. § 1603(b).

Under the FSIA, foreign states and their agents are immune from the jurisdiction of federal and state courts in the United States unless the case falls within one or more of the specific

exceptions provided in the FSIA. Appellants aver that the "commercial activity" exception is applicable in the instant case[3] and that, therefore, the court below could have properly exercised jurisdiction over appellees. The "commercial activity" exception provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> * * * * *
>
> (2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. §1605(a)(2).

Appellants contend that of the three clauses contained in section 1605(a)(2), both the first and third clauses provide the court with jurisdiction over the appellees.[4] We will consider each of these clauses separately.

The first clause of section 1605(a)(2) states that courts of the United States have jurisdiction over a foreign state in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state." Thus, this clause requires

> "that the commercial activity involve substantial [contacts] with the United States, and that there be a close connection between the facts of the alleged injury and the transaction or conduct at issue, in order to establish lack of immunity under the FSIA. *Sugarman v. Aeromexico*, 626 F.2d 270 (3d Cir. 1980)."

Tigchon v. Island of Jamaica, 591 F.Supp. 765 (W.D. Mich. 1984). Appellants set forth numerous examples of appellees' alleged commercial activity in the United States. For the purpose of this appeal, we will assume that all of appellants' allegations are true.[5] Even with the support of this assumption, however, the instant litigation does not fall within the purview of the first clause of section 1605(a)(2). While appellees may indeed conduct commercial activity in the United States, it is clear that appellants' cause of action is not "*based upon*" that alleged commercial activity or any "commercial activity carried on in the United States." Rather, appellants' suit is based upon the alleged negligence of appellees in the Commonwealth of the Bahamas. Thus, the first clause of section 1605(a)(2) is inapplicable to the case at bar.

The similar factual circumstances and legal result of *Tigchon v. Island of Jamaica*, *supra*, and *Harris v. VAO Intourist, Moscow*, 481 F.Supp. 1056 (E.D.N.Y. 1979) support our decision. In both cases the plaintiffs allegedly suffered injuries abroad through an agency or instrumentality of a foreign state, and sought to establish jurisdiction under the "commercial activity" exceptions of section 1605(a)(2).

> In *Harris*, an American citizen was killed in a hotel fire in Moscow. Suit was brought against two state-owned Russian tourist services, one of which, Intourist Moscow, owned and operated the hotel, and the other of which, Intourist USA, promoted tours between the United States and the Soviet Union. Intourist USA maintained an office in New York and conducted substantial business there, promoting the use of Intourist, Moscow's hotel facilities in Moscow. The plaintiff there, however, arranged for his accommodations in Moscow through a private travel agency. Noting that the first clause of section 1605(a)(2) requires that a court action "be based upon" specific commercial activity conducted in the United States, a more stringent test than the typical "doing business" requirement of many long-arm statutes, the Court found the action "not based upon commercial activity in the United States." *Id.* at 1061. The relationship between

> negligent operation of the National Hotel and Intourist's United States activity was too attenuated to find that the action was "based upon" such activity.

Tigchon, supra at 767.

Similarly, in *Tigchon, supra*, plaintiff brought suit to recover damages for the death of her husband in a water-skiing accident at the Negril Beach Village, a resort hotel owned and operated by the Island of Jamaica. Plaintiff alleged that she and her husband obtained travel literature advertising the Negril Beach Village at a Michigan travel agency, and that Jamaica advertises the Negril beach Village in the United States. Plaintiff also made other allegations concerning the "commercial activity" that Jamaica carries on in the United States. Despite these allegations, however, the *Tigchon* court held that the plaintiff's cause of action was not "based upon" substantial contacts with the United States.

> The death of plaintiff's decedent is allegedly due to the negligent conduct of an employee of the Negril Beach Village accompanying plaintiff's decedent while waterskiing . . . The Act clearly contemplates a direct connection between the injury suffered and the contacts with the United States. No such direct nexus exists between a one-line advertisement in a world-wide listing of hotels, an advertisement published by an independent tour operator, and the tragic death of Mr. Tigchon while water-skiing. Any links are simply too attenuated and indirect to satisfy the first clause of section 1605.

Tigchon, supra at 768.

We find that an identical result is warranted in the instant case. Even assuming that all of appellants' allegations concerning appellees' commercial activity in the United States are valid, it is nevertheless clear that any nexus between that activity and appellants' cause of action is too attenuated to satisfy the first clause of section 1605.

Similarly, we find that appellants' cause of action also fails to satisfy the third clause of section 1605. The third clause provides

that a foreign state is not immune from jurisdiction in a case based upon "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." In the case at bar, the cause of action is clearly based upon an act performed outside the United States in connection with a commercial activity of the foreign state elsewhere. It is equally clear, however, in accordance with case law, that the act did not cause a *direct effect* in the United States.

We again turn to *Harris v. VAO Intourist, Moscow, supra,* to clarify section 1605(a)(2). In that case, plaintiff brought suit pursuant to the commercial activity exception of section 1605. In dismissing the action, the *Harris* court held:

> Obviously the negligent operation of a hotel in Moscow causing the death of a United States resident has effects in the United States; here it leaves aggrieved relatives in this country. But the precise issue is not whether the fire had any effect here, but whether it had a 'direct effect' in the United States within the meaning of the statutory language. Indirect injurious consequences within this country of an out-of-state act are not sufficient contacts to satisfy the 'direct effect' requirement of section 1605(a)(2). Congress explained that the third clause of section 1605(a)(2) embraces 'commercial conduct abroad having direct effects within the United States which would subject such conduct to the exercise of jurisdiction by the United States consistent with principles set forth in section 18, Restatement of the Law, Second, Foreign Relations Laws of the United States (1965)' H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 13, *reprinted in* [1976] U.S. Code Cong. & Admin. News, pp. 6604, 6618. The reference to section 18 of the Restatement (Second) of the Foreign Relations Laws of the United States suggests that the term 'direct effect' requires a substantial impact in this country that is a directly foreseeable result of the negligent act outside the country; it is essentially a long-arm provision.

Id. at 1602. Thus, despite the obvious economic and emotional effect upon the decedent's family in this country, the court found that defendant's negligence in Moscow did not have a "direct effect" in the United States.

As stated in *Close v. American Airlines, Inc.*, 587 F.Supp. 1062 (S.D.N.Y. 1984), "personal injury, or even death, inflicted on Americans while they are abroad does not have a direct effect in the United States, within the statute, simply because of the consequent economic loss to the American victims or their heirs." *Id.* at 1064. Thus, it is clear that the alleged negligence of appellees did not cause a "direct effect" in the United States. Therefore, the third clause of section 1605(a)(2) is also inapplicable to the case at bar.

Since none of the exceptions to the jurisdictional immunity granted to foreign states under the FSIA are applicable to the instant case, the trial court did not err in determining that it did not have jurisdiction over appellees. Thus, the court properly granted appellees' preliminary objections and dismissed appellants' complaints as to appellees.[7]

Orders affirmed.

FOOTNOTES

[1] Appellants first brought suit by a complaint in assumpsit and trespass filed in July, 1983. The original complaint named as defendant "The Ambassador Beach Hotel c/o The Hotel Corporation of the Bahamas." Shortly thereafter, appellants were informed that the Ambassador Beach Hotel was owned and operated by the Hotel Corporation of the Bahamas.

Appellants responded to this information in two ways. First, they amended their original complaint to name not only "The Ambassador Beach Hotel c/o The Hotel Corporation of the Bahamas" but also to add as a defendant "The Hotel Corporation of the Bahamas trading as the Ambassador Beach Hotel." Second, on October 27, 1984, appellants filed a new, identical action in the Court of Common Pleas of Philadelphia County naming as defendant "The Hotel Corporation of the Bahamas t/a The Ambassador Beach Hotel."

[2] Appellants appealed from the lower court's orders entered March 2, 1984, March 19, 1984, April 11, 1984, May 22, 1984, and June 18, 1984. The appeals were then consolidated for consideration before this court. All of the orders under review concern the grant of appellees' preliminary objections, the denial of appellants' preliminary objections and the dismissal of appellants' complaints against appellees herein. Appellants raise the following issues in the appeal:

> A. Whether preliminary objections of defendant-appellees, Ambassador Beach Hotel and the Hotel Corporation of Bahamas, were properly sustained in the absence of discovery and upon the presumption of the truth of the averments in plaintiffs' complaint?
>
> B. Whether it is incumbent upon the lower court to take evidence upon averment of fact contained in preliminary objections and in particular when such preliminary objections do not contain a notice to plead?
>
> C. Whether state court has jurisdiction over foreign corporations owned by a foreign government (Bahamas) which corporations are engaged in commercial activity in the United States?

Brief for Appellants at 7. As we will clarify *infra*, we find that we need discuss only issue C.

[3] It is clear that none of the other exceptions to the jurisdictional immunity of a foreign state as enumerated in §1605 apply in the case at bar.

[4] Clause two, which deals with "an act performed in the United States," is clearly inapplicable to the instant case.

[5] We note that in issues A and B, appellants aver that the lower court erred in dismissing their complaint without permitting discovery or taking evidence. Since, even assuming the validity of appellants' allegations, the lower court did not have jurisdiction

over appellees, such discovery and evidence were unnecessary and could not support the reinstatement of appellants' complaint as to appellees.

[6] Appellants cite Sugarman v. Aeromexico, 626 F.2d 270 (3d Cir. 1980) in support of their position. We agree with the *Tigchon* courts' analysis of that case:

> *Sugarman v. Aeromexico*, 626 F.2d 270 (3d Cir. 1980) is readily distinguishable. There, the national airline of Mexico had daily flights between the United States and Mexico, a clearly more substantial presence in the United States than the purported contacts had by Jamaica here. Moreover, the plaintiff's suit was based upon the canceling or delay of an Aeromexico flight to the United States, leaving the plaintiff stranded in a Mexico airport for 15 hours. His suit was thus directly "based upon" Aeromexico's contacts with the United States. The same cannot be said of [appellants'] suit here. The action must therefore be dismissed.

Tigchon v. Island of Jamaica, 591 F.Supp. 765, 768 (W.D. Mich. 1984).

[7] Given our assumptions and decision as to issue C, we find it unnecessary to address issues A and B as stated by appellants.

LOUIS and JACQUELINE TUCKER, H/W AND CHRISTINE TUCKER, BY HER PARENTS and GUARDIANS, LOUIS and JACQUELINE TUCKER, Appellants	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	Nos. 977, 1055, 1056, 1109 Philadelphia 1984
WHITAKER TRAVEL, LTD. and APPLE TOURS and THE AMBASSADOR BEACH HOTEL, and HAPPY TRAILS STABLES, THE HOTEL CORPORATION OF THE BAHAMAS T/A THE AMBASSADOR BEACH HOTEL	:	
LOUIS and JACQUELINE TUCKER, H/W and CHRISTINE TUCKER, BY HER PARENTS and GUARDIANS, LOUIS and JACQUELINE TUCKER, Appellants	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
WHITAKER TRAVEL, LTD. and APPLE TOURS, and HAPPY TRAILS STABLES and THE HOTEL CORPORATION OF THE BAHAMAS T/A THE AMBASSADOR BEACH HOTEL	:	No. 1792 Philadelphia 1984

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of PHILADELPHIA County be, and the same is hereby AFFIRMED.

BY THE COURT:

J. Haniel Henry
PROTHONOTARY

Dated: OCTOBER 18, 1985

APPENDIX F

THE SUPERIOR COURT OF PENNSYLVANIA
Sitting at Philadelphia

NOS. 977, 1055, 1056, 1109
1792 Philadelphia 1984
and NOS. 605, 606 Philadelphia 1985

LOUIS AND JACQUELINE TUCKER, h/w and CHRISTINA TUCKER, by her Parents and Guardians, Louis and Jacqueline Tucker, Appellants

v.

AMBASSADOR BEACH HOTEL, et al.

ORDER

"AND NOW, April 17, 1985, Appellant's Petition for Consolidation is denied.

Per Curiam"

APPENDIX F-2

THE SUPERIOR COURT OF PENNSYLVANIA
Sitting at Philadelphia

NOS. 605, 606 Philadelphia 1985

LOUIS AND JACQUELINE TUCKER, h/w and CHRISTINA TUCKER, by her Parents and Guardians, Louis and Jacqueline Tucker, Appellants

v.

AMBASSADOR BEACH HOTEL, et al.

ORDER

"AND NOW, September 10, 1985, the petition of The Ambassador Beach Hotel and Happy Trails Stables for consolidation with Appeal Nos. 977, 1055, 1056, 1109, 1792 Philadelphia 1984 is denied.

Per Curiam"

APPENDIX G

LOUIS and JACQUELINE TUCKER, h/w, and CHRISTINE TUCKER, BY HER PARENTS and GUARDIANS, LOUIS and JACQUELINE TUCKER	:	COURT OF COMMON PLEAS JULY TERM, 1983 NO. 4638
v.	:	
WHITAKER TRAVEL LTD., APPLE TOURS, HAPPY TRAILS STABLES and THE HOTEL CORPORATION OF THE BAHAMAS, t/a THE AMBASSADOR BEACH HOTEL	:	COURT OF COMMON PLEAS OCTOBER TERM, 1983 NO. 4665

ORDER AND OPINION

DI BONA, J.

AND NOW, this 6th day of February, 1985, after consideration of the oral arguments of counsel, it is hereby ORDERED AND DECREED that the motion of the plaintiffs to introduce after-discovered evidence is denied. The evidence should not be made part of the record pursuant to Pa. R.C.P. 1926.

The Court does not believe that the evidence sought to be introduced by the plaintiff should be allowed since the evidence for the most part is hearsay. It is also of no importance under the Foreign Sovereign Immunities Act that the appellees conducted other commercial activity in the United States since there is no showing that those activities are directly related to the instant law suit. As the Court previously ruled, personal injuries sustained outside of the United States do not constitute "direct effects" in this country as set forth in 28 U.S.C. §1605(a)(2).

BY THE COURT:

_____

ALFRED J. DI BONA, JR.
J.

LOUIS and JACQUELINE TUCKER,	:	COURT OF
h/w and CHRISTINE TUCKER, BY	:	COMMON PLEAS
HER PARENTS and GUARDIANS,	:	PHILADELPHIA
LOUIS and JACQUELINE TUCKER,	:	COUNTY
Appellants	:	JULY TERM, 1983
	:	NO. 4638
	:	
	:	
v.	:	
	:	
	:	
	:	COURT OF
WHITAKER TRAVEL LTD., APPLE	:	COMMON PLEAS
TOURS, HAPPY TRAILS STABLES and	:	PHILADELPHIA
THE HOTEL CORPORATION OF THE	:	COUNTY
BAHAMAS, t/a THE AMBASSADOR	:	OCTOBER
BEACH HOTEL,	:	TERM, 1983
Appellees.	:	NO. 4665

ORDER

AND NOW, this 6th day of February, 1985, upon consideration of The Hotel Corporation of the Bahamas and The Ambassador Beach Hotel's Motion for Protective Order it is hereby ORDERED and DECREED that the Motion is granted and plaintiffs are prohibited from seeking any further discovery of defendants, The Hotel Corporation of the Bahamas and The Ambassador Beach Hotel, pending disposition of the appeals in the Superior Court of Pennsylvania docketed at Nos. 977, 1055, 1056, 1109 and 1792, Philadelphia, 1984.

BY THE COURT:

_____

J.

Appendix H

IN THE SUPERIOR COURT OF PENNSYLVANIA

LOUIS and JACQUELINE TUCKER, his. wife, et al., etc.,	:	Nos. 977, 1055, 1056, 1109, 1792
Appellants	:	Philadelphia 1984
	:	C.P. Trial Division-Law, Philadelphia,
vs.	:	No. 4638 July 1983
	:	and 4665
WHITAKER TRAVEL, LTD., et al.	:	October 1983

ORDER

AND NOW, December 20, 1984, this matter is remanded to the trial court for the purpose of determining whether the following should be made part of the record pursuant to Pa.R.A.P. 1926:

1. The Complaints and/or Answers thereto, filed in Dade County, Florida, in actions 24-80-22811-CA01; 1-82-20647-CA01; 01-82-261-SP21; and 14-83-16768-CA01.

2. Answers of defendant Atkinson & Mullen Travel, Inc. to Plaintiffs' Interrogatories; letter from the Ambassador Beach Hotel to Atkinson & Mullen Travel, Inc, dated August 17, 1982; Commonwealth of the Bahamas' Answer to Plaintiffs' Petition to Remand; and telegram received by Atkinson & Mullen Travel, Inc., dated 1-13-83, filed in the Court of Common Pleas of Philadelphia County, in action No. 2725 September Term, 1984.

After hearing, the trial court shall enter its findings which shall then be transmitted to this Court.

Jurisdiction is retained.

Per Curiam

Appendix I

LOUIS and JACQUELINE TUCKER, et al	:	COURT OF COMMON PLEAS OF PHILADELPHIA
vs.	:	COUNTY
	:	OCTOBER TERM, 1983
WHITAKER TRAVEL, LTD., et al.	:	No. 4665

ORDER

AND NOW, to wit, this day of June, Defendant's, The Hotel Corporation of Bahamas, Motion For A Protective Order is granted and it is Ordered that Plaintiff's Pending Discovery (Interrogatories and Document Requests) need not be answered or produced pending the outcome of said Defendant's Preliminary Objections to Plaintiffs' Complaint.

BY THE COURT:

_____

J.

June 18, 1984

Appendix J

LOUIS AND JACQUELINE H. TUCKER, H/W and CHRISTINE TUCKER, by her Parents and guardians, LOUIS AND JACQUELINE TUCKER	:	COURT OF COMMON PLEAS
v.	:	
WHITAKER TRAVEL, LTD.	:	JULY TERM, 1983
and	:	
APPLE TOURS	:	
and	:	
THE AMBASSADOR BEACH HOTEL	:	
and	:	
HAPPY TRAILS STABLES	:	NO. 4638

OPINION

DIBONA, JR., A., J. DATE: March 2, 1984

This matter is before the court on the defendant, the Ambassador Beach Hotel's preliminary objections to the plaintiffs' complaint.

A review of the pleadings reveals that the suit stems from injury sustained while the plaintiffs' were horseback riding in the Commonwealth of the Bahamas. Suit was instituted in the Common Pleas Court of Philadelphia County.

The primary thrust of the preliminary objections is that this court lacks jurisdiction over the Ambassador Beach Hotel which is owned and operated by the Hotel Corporation of the Bahamas. The Hotel Corporation of the Bahamas was established by special act of the legislature of the Commonwealth of the Bahamas and is a creation of the Commonwealth and fully owned by it. Accordingly, The Hotel Corporation is subject to the Foreign Sovereign Immunities Act of 1976, 28 U.S.C.A. Section CO-2-1611.

In determining whether this Court has subject matter jurisdiction pursuant to the above Act, one must look at Section 1605(a)(2) which provides:

> "A foreign state shall not be immune from the jurisdiction of the courts of the United States or of the states in any case in which the action is based upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that Act causes a direct effect in the United States."

Since the alleged tortuous conduct of the Ambassador Beach Hotel occurred in the Commonwealth of the Bahamas, the primary question that the court must resolve is whether that conduct had a direct effect in the United States. In *Dorrian v. Lucayan Bay Hotel*, #80-17-40 Slip Opinion (E.D.PA. December 2, 1980) the court found that an American citizen, who was injured abroad, does not have a direct effect in the United States despite the fact that the pain and suffering and economic loss will continue in this country. As the court stated:

> "The court finds that causing injury to an American citizen abroad does not cause a direct effect in the United States despite the fact that the injury which was suffered abroad continues to cause suffering and economic loss to the plaintiff in the United States. See *Harrahs v. VAI Intourist, Moscow*, Supra; *Uptown v. Empire Iran*, Supra at 266. Plaintiffs injury is the direct result of defendants' alleged tortuous conduct in that injury occurred outside the United States. Had the injury been suffered in the United States a different conclusion might have been warranted. See *Yessenin-Volpin v. Novosti Press Agency, Tass*, Supra, (suggested injury in the United States to good name and reputation of plaintiff by publicaton of libelous article outside the United States satisfied the direct requirements)." *Dorrian v. Lucayan Bay Hotel*, Supra at 9 and 10.

This Court is persuaded by the reasoning set forth above and dismisses the plaintiffs complaint against the Ambassador

Beach Hotel. It is clear that the tortuous act of the Ambassador Beach Hotel occurred in the Commonwealth of the Bahamas and did not occur in the United States. The fact that the plaintiffs relocated in the Commonwealth of Pennsylvania subsequent to their injuries, does not have a direct effect in the United States as defined in the Foreign Sovereign Immunities Act of 1976. For the foregoing reasons, the court grants the preliminary objections of the Ambassador Beach Hotel and dismisses the complaint as to that defendant.

BY THE COURT:

_____

ALFRED J. DiBONA, JR.
J.

APPENDIX K

No. 20 of 1974

An Act to provide for the establishment of The Hotel Corporation of The Bahamas, for the functions of the Corporation and for matters connected therewith or incidental thereto.

[Assented To: 18th October, 1974]
[Commencement: 18th October, 1974]

Be it enacted by The Queen's Most Excellent Majesty, by and with the advice and consent of the Senate and the House of Assembly of the Commonwealth of The Bahamas, and by the authority of the same, as follows:—

PART I

Preliminary

1. This Act may be cited as The Hotel Corporation of The Bahamas Act, 1974.

2.—(1) In this Act, unless the context otherwise requires —

"The Bahamas" includes any waters contiguous to The Bahamas in which the hotel and resort industry can be lawfully carried on;

"the Board" means the Board of the Corporation;

"the Corporation" means The Hotel Corporation of The Bahamas established by section 3;

"financial year" means —

(a) in 1974, the period ending on the 31st day of December, 1974; and

(b) thereafter, subject to paragraph (c) of this definition, the period of twelve months ending on the 31st day of December or such other period of twelve months as the Corporation, with the approval of the Minister, may determine to be its financial year; and

(c) if the Corporation proposes to change its financial year, any period (whether shorter or longer than twelve months) employed to give effect to the change;

"hotel and resort industry" includes facilities for the holding of conventions, casinos, and provision for lawful entertainment, the sale of any articles, recreation, sport or game;

"Minister" means the Minister responsible for the Corporation;

"prescribed" means prescribed by regulations made under this Act;

"subsidiary company" means a company formed and registered under The Companies Act in which the Corporation owns or controls more than fifty *per centum* of the voting rights.

(2) Nothing in this Act shall be construed as preventing the appointment of the Minister of Finance as the Minister responsible for the Corporation under this Act.

PART II

The Corporation

3.—(1) There is hereby established a Corporation to be known as The Hotel Corporation of The Bahamas, the purposes of which shall be the extension and the improvement of the hotel and resort industry in The Bahamas.

(2) The First Schedule shall have effect with respect to the Corporation, its members and staff.

4.—(1) There shall by virtue of this section and without further assurance vest in the Corporation in fee simple free of all trusts and encumbrances all such land immediately before the commencement of this Act vested in the Treasurer as shall be described by the Minister of Finance in the Second Schedule by notice published in the *Gazette*.

(2) Where the Corporation acquires any interest in land other than that described in subsection (1), the description of the

land and the Corporation's title thereto shall be specified in the Second Schedule by notice of addition thereto published in the *Gazette* by the Minister.

(3) Where the Corporation divests itself of any interest in land referred to in subsection (1) or subsection (2), the Minister shall by notice published in the *Gazette* amend the Second Schedule accordingly.

5. For the purposes for which it is established the Corporation shall have power, whether alone or in association with other bodies or persons, or as holding company of one or more subsidiary companies, or as managing agent on behalf of other bodies or persons—.

(a) to carry out any undertakings in The Bahamas which appear to the Corporation to be needed for the achievement of its purposes;

(b) to assist other bodies or persons, either financially or in any other way, to carry on any undertaking which appears to the Corporation to be needed for the achievement of its purposes;

(c) to carry on any activities incidental to any undertaking (whether or not property of the Corporation) which appear to the Corporation to be necessary for the promotion of that undertaking.

6.—(1) The Minister may, after consultation with the Board, give to the Corporation such directions in writing, whether of a general or specific character, as to the performance of its functions as appear to the Minister to be requisite in the public interest, and the Corporation shall give effect to any such directions.

(2) The Corporation shall furnish the Minister with such returns, accounts and other information as he may from time to time require with respect to the property and activities of the Corporation, and shall afford to him facilities for verifying such information in such manner and at such times as he may reasonably require.

PART III

Financial

7. The funds and resources of the Corporation shall consist of—

(a) such moneys as may be provided by Parliament;

(b) such moneys as may from time to time accrue to the Corporation from its operations;

(c) such moneys as may from time to time be borrowed by the Corporation pursuant to section 8;

(d) such other moneys and property as may in any manner be lawfully paid to or vested in the Corporation whether or not in respect of any matter incidental to its functions.

8.—(1) Subject to this section, the Corporation may borrow sums required by it for meeting any of its obligations or discharging any of its functions and may in respect of any such borrowing, issue debentures in such form as the Corporation may determine.

(2) The power of the Corporation to borrow shall be exercisable only with the approval of the Minister given with the consent of the Minister of Finance, as to the amount and as to the sources of the borrowing and as to the terms on which the borrowing may be effected.

(3) An approval given in any respect for the purposes of this subsection may be either general or limited to a particular borrowing or otherwise and may be either unconditional or subject to conditions.

(4) A person lending money to the Corporation shall not be bound to inquire whether the borrowing of money is within the power of the Corporation.

9.—(1) Subject to subsection (3), for the purpose of enabling the Corporation to defray expenditure properly chargeable to capital account, including provision of working capital, the Minister of Finance may make advances to the Corporation.

(2) Subject to subsection (3), the Minister of Finance may guarantee, in such manner and on such conditions as he may think fit, the repayment of the principal of, and the payment of interest and other charges on, any authorised borrowings of the Corporation made otherwise than by way of advance under the foregoing subsection.

(3) No advances shall be made and no guarantees shall be given under this section except in accordance with the Financial Administration and Audit Act, 1973.

(4) Where any sum is issued for fulfilling such a guarantee, the Minister of Finance shall, as soon as possible after the end of each financial year beginning with that in which the sum is issued and ending with that in which all liability in respect of the principal of the sum and in respect of interest thereon is finally discharged, lay before each House of Parliament a statement relating to that sum.

10.—(1) The Corporation shall make to the Minister, at such times and in such manner as he may with the approval of the Minister of Finance direct, payments of such amounts as he may so direct in or towards repayment of advances made to the Corporation under the last foregoing section and of any sums issued in fulfilment of any guarantee given thereunder, and payments of interest on what is outstanding for the time being in respect of such advances and of any sums so issued at such rate as he may so direct, and different rates of interest may be directed as respects different advances or sums and as respects interest for different periods.

(2) The Minister shall lay before each House of Parliament a statement of any payment due from the Corporation under subsection (1) of this section which is not duly paid to him as required thereunder.

11.—(1) Subject to subsection (2), any moneys standing to the credit of the Corporation and not required for any current purpose (in this section referred to as "surplus funds") may from time to time either be carried to any reserve fund established under section 12 or be invested by the Corporation in securities approved either generally or specifically by the Minister; and the

Corporation may from time to time, with the like approval, sell any or all of any such securities.

(2) No surplus funds shall be carried to reserve or invested under subsection (1) without the consent of the Minister of Finance, and the Minister of Finance may direct that the whole or any part of any surplus funds are paid into the Consolidated Fund.

12.—(1) The Corporation shall establish a reserve fund.

(2) Subject to subsection (3), the management of the said fund, the sums to be carried from time to time to the credit thereof, and the application thereof, shall be as the Corporation may determine;

Provided that—

(a) no part of the said fund shall be applied otherwise than for the purposes of the Corporation; and

(b) the power of the Minister to give directions to the Corporation shall extend to the giving to it, with the approval of the Minister of Finance, of directions as to any matter relating to the establishment or management of the said fund, the carrying of sums to the credit thereof, or the application thereof, notwithstanding that the directions may be of a specific character.

(3) The Minister of Finance may at any time direct that any part of the reserve fund established under subsection (1) shall be paid into the Consolidated Fund.

13.—(1) It shall be the duty of the Corporation so to exercise and perform its functions as to secure that its revenues are not less than sufficient to meet all sums properly chargeable to its revenue accounts (including, without prejudice to the generality of that expression, provisions in respect of its obligations under the two last foregoing sections), taking one year with another.

(2) Any excess of the revenue of the Corporation for any financial year thereof over the sums properly chargeable to its revenue account for that year (including as aforesaid) shall be

applied by the Corporation for such purposes as it may determine with the approval of the Minister given with the consent of the Minister of Finance.

14.—(1) The Corporation shall keep proper accounts and other records in relation thereto, and shall prepare in respect of each financial year of the corporation a statement of accounts in such form as the Minister may with the approval of the Minister of Finance direct, being a form which shall conform with the best commercial standards.

(2) The Minister shall lay a copy of every such statement before each House of Parliament, together with a copy of any report made by the auditors on the statement or on the accounts.

FIRST SCHEDULE (Section 3)

Provisions relating to the constitution, etc., of The Hotel Corporation of The Bahamas.

1.—(1) The Corporation shall be a body corporate with power to sue or be sued in its corporate name, and with perpetual succession and a common seal which shall be judicially noticed.

(2) The Corporation shall consist of a Chairman, who shall be the Minister, a deputy Chairman and such number of other members, not being less than three or more than seven as the Minister may from time to time determine.

(3) The deputy chairman and the other members of the Corporation shall be appointed by the Minister from amongst persons appearing to him to be qualified as having had experience of, or having shown capacity in, matters relating to the hotel and resort industry, finance, administration or organization of workers.

2. The Minister may, by statutory instrument, make regulations with respect to—

(a) the appointment of the members of the Corporation, and their tenure and vacation of office;

(b) the execution of instruments and the mode of entering into contracts by and on behalf of the Corporation,

and the proof of documents purporting to be executed, issued or signed by the Corporation or a member or officer thereof;

and subject to the provisions of any such regulations as aforesaid, the Corporation may regulate its own procedure (including the manner in which matters subject to the determination of the Corporation are to be determined by or on behalf of the Corporation).

3. The validity of any proceeding of the Corporation shall not be affected by any vacancy amongst the members thereof, or by any defect in the appointment of a member thereof.

4. The Corporation shall pay to each member of the Corporation, in respect of his office as such, such remuneration and allowances as may be determined by the Minister with the consent of the Minister of Finance, and to the chairman and to the deputy chairman, in respect of his office as such, such remuneration and allowances (in addition to any remuneration or allowances to which he may be entitled in respect of his office as a member) as may be so determined.

5. If any member of the Corporation, other than the chairman or the deputy chairman, is employed about the affairs of the Corporation otherwise than as a member thereof, the Corporation may pay to that member such remuneration and allowances (in addition to any remuneration or allowances to which he may be entitled in respect of his office as a member) as the Corporation may determine.

6. The Corporation shall—

(a) pay to its officers, servants and agents such remuneration as the Corporation may determine; and

(b) as regards any officers, servants or agents in whose case it may be determined by the Corporation with the approval of the Minister to make provision for the payment on their death, injury or retirement of pensions, gratuities or other like benefits, pay, or provide for the payment of such pensions, gratuities or other like benefits to them or to others by reference to their service as may be so determined.

7. Provision for pensions, gratuities or other like benefits under this Schedule may be made either by contributory arrangements or partly by the one and partly by the other.

8. The Corporation shall have power to do anything and to enter into any transaction (whether or not involving expenditure, borrowing in accordance with the provisions of this Act in that behalf, lending or investment of money, the acquisition of any property or rights, or the disposal of any property or rights) which is incidental or conducive to the exercise of its powers under this Act.

9. It is hereby declared that nothing in this Act exempts the Corporation from liability for any tax, duty, rate, levy or other charge whatsoever.

APPENDIX L

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-1709/1710

LOUIS AND JACQUELINE H. TUCKER
H/W AND CHRISTINA TUCKER,
by her parents and guardians
LOUIS AND JACQUELINE H. TUCKER,

Appellants

v.

WHITAKER TRAVEL, LTD.
ATKINSON & MULLIN TRAVEL, INC.
R.M. TOURS a/k/a RICHARD MOSS TOURS, LTD.,
HAPPY TRAILS STABLES and
COMMONWEALTH OF THE BAHAMAS
MINISTRY OF TOURISM

On Appeal from United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Nos. 84-5123, 85-1685)

District Judge: Alfred L. Luongo

Submitted Under Third Circuit Rule 12(6)
June 5, 1986

Before: ALDISERT, *Chief Judge*,
GARTH, and SLOVITER, *Circuit Judges*

(Filed June 9, 1986)

MEMORANDUM OPINION

SLOVITER, *Circuit Judge*.

Plaintiffs Jacqueline Tucker, her husband Louis, and their daughter Christina appeal from the district court's order dismissing two complaints filed by them against the Commonwealth of the Bahamas and its Ministry of Tourism for injuries suffered by Jacqueline and Christina when they fell from their horses in the Bahamas and sustained injuries. According to the complaint, the mother and daughter arranged for a trip to the Bahamas through a private travel agency in response to an advertisement by a private touring company. While on their trip, the Tuckers contracted with a privately owned and operated stable for a horseback ride on the beach when the mishap occurred.

The complaints were originally filed in Pennsylvania state court and one named as defendants the Commonwealth of the Bahamas (Bahamas), the Ministry of Tourism (jointly referred to as "foreign state defendants"), the travel agent, the tour operator, and the stables, and sought damages for the injuries sustained as a result of the falls. The other contained essentially the same allegations but named only the Bahamas and the Ministry of Tourism as defendants. The complaints were removed to the district court by the foreign defendants. The foreign state defendants then filed a motion to dismiss the complaints against them on the ground of sovereign immunity, which the district court granted. The court remanded the remaining defendants to state court. *See Tucker v. Whitaker Travel, Ltd.*, 620 F.Supp., 578, 587 (E.D. Pa. 1985).

The Foreign Sovereign Immunity Act ("Act"), 28 U.S.C. §§1602 *et seq.*, provides immunity from suit in the United States for a foreign state and corporations owned by it unless the claim falls within one of the statutory exceptions. 28 U.S.C. §1604.

There is no subject matter jurisdiction or personal jurisdiction over such a foreign state defendant unless, under the provision relevant here,

> the action is based upon a commercial activity carried on in the United States by the foreign state [clause 1]; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere [clause 2]; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States [clause 3].

28 U.S.C. § 1605(a)(2).

The district court concluded that the plaintiff's claim was not "based upon" the foreign state defendants' commercial activity so as to come within clause 1 of section 1605(a)(2). The foreign state defendants concede that they engage in a commercial activity, i.e. the promotion of tourism, in the United States to come within clause 1. However, there must be a nexus between the plaintiffs' grievance and the sovereign's commercial activity in the United States. *See Velidor v. L/P/G Benghazi*, 653 F.2d 812, 820 (3d Cir. 1981).

The Tuckers claim that their injuries were caused by the negligence of certain employees of a privately owned and operated stable located in the Bahamas. We agree with the district court that the relationship between this claim and the foreign state defendants' advertisements in the United States is too attenuated to satisfy the requirements that the claim be "based upon" the foreign state defendants' commercial activity in the United States.[1]

Patently, the allegations of the complaints do not satisfy the requirement of clause 2 that the action be based upon "an act performed in the United States." Plaintiffs argue, however, that they satisfy clause 3, under which a foreign state loses its immunity, and thereby becomes subject to jurisdiction of courts of

1. The district court held that to the extent that the Tuckers' alternate theories of recovery against the governmental defendants — negligent misrepresentation, breach of warranty, and duty to warn — could be viewed as "based on" the defendants' commercial activities in the United States, the facts alleged failed to state a claim upon which relief could be granted. We affirm this holding.

the United States, if an act outside the United States in connection with a foreign state's commercial activity elsewhere causes a direct effect in the United States. The Tuckers argue that their injuries in connection with the foreign state defendants' commercial activity caused a direct effect in the United States. We have previously held, however, that causing injury to an American citizen abroad does not cause a direct effect in the United States despite the fact that the injury continues to cause suffering. *Sugarman v. Aeromexico, Inc.*, 626 F.2d 270, 272 (3d Cir. 1980).

In addition, as we concluded above, the acts upon which the Tuckers base their claims are in no way connected to the foreign state defendants' commercial activity. Finally, we are unpersuaded by plaintiffs' contentions that regulation of tourism and/or the alleged failure to regulate horseback riding, provide adequate police or investigative reports, or take action against the other parties sued in this action are commercial activities. As the district court concluded, these are "peculiarly governmental" activities. *See* 620 F. Supp. at 584.

Since none of the exceptions in §1605(a)(2) applies to the foreign state defendants' commercial activity, they retain their immunity from judicial action. Therefore, the district court did not err in holding that it had no personal or subject matter jurisdiction over the foreign state defendants.

We will affirm the district court's order dismissing the complaint against the foreign state defendants.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

IN THE
SUPREME COURT OF THE UNITED STATES

No. 86-1112

LOUIS AND JACQUELINE TUCKER, H/W AND CHRISTINA TUCKER, by her parents and guardians LOUIS AND JACQUELINE H. TUCKER
Petitioners

v.

THE AMBASSADOR BEACH HOTEL, THE HOTEL CORPORATION OF THE BAHAMAS, WHITAKER TRAVEL, LTD., APPLE TOURS AND HAPPY TRAILS STABLES
Respondents

BRIEF FOR RESPONDENTS THE HOTEL CORPORATION OF THE BAHAMAS TRADING AS THE AMBASSADOR BEACH HOTEL IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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EDITOR'S NOTE

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This Brief is filed on behalf of respondent The Hotel Corporation of the Bahamas, trading as The Ambassador Beach Hotel.

I. OPINIONS BELOW

The reported opinions below are provided in the Appendix to Petition for Writ of Certiorari.

II. JURISDICTION

As set forth in the Petition for Writ of Certiorari, jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

III. STATUTES INVOLVED

The statute involved in the Petition for Writ of Certiorari is the Foreign Sovereign Immunities Act, 28 U.S.C. §1601 et seq. Section §1605 of the Act provides, in pertinent part:

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -

* * *

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

IV. COUNTERSTATEMENT OF THE CASE

Many of petitioners' factual averments in the Statement of the Case are unsupported by the record and represent disputed, unverified embellishments of the bare pleadings under review. For example, petitioners contend that the accident was a direct result of the Hotel's commercial joint venture with Apple Tours. There is no evidence of any "joint venture" on the record. Nor is there any allegation or proof that respondent Hotel Corporation "lured the Tucker women to its facility in the Bahamas by conducting extensive commercial activity in the United States" (Petition p. 18)

More importantly, neither the Complaint nor the Amended Complaint allege a cause of action based upon negligent misrepresentation or false advertising. The only negligence alleged relates to the horseback riding stables operated by Happy Trails Stables in the Island of the Bahamas.

Essentially, this case is a personal injury action for damages sustained by petitioners in a horseback riding accident which occurred on December 4, 1982 near the Happy Trails Stables facility in the Bahamas while the petitioners were riding on Happy Trails horses which they had hired for the afternoon. Happy Trails Stables is a private commercial enterprise.

Respondent, The Hotel Corporation of the Bahamas, is a governmental subsidiary which owns the Ambassador Beach Hotel. Petitioners were staying at the Ambassador Beach Hotel on their Bahamian vacation. **Respondent's only connection with petitioners' accident is the fact that they permitted Happy Trails Stables to display its brochures in the lobby of the Hotel.**

More specific clarifications of the record will be addressed in the respondents' brief on the merits if the Court grants this appeal but will not be stated here because even if the facts argued by

petitioners were part of the record, those facts would not be sufficient to allow the Pennsylvania courts to assume jurisdiction over the foreign entity respondent or change the correctness of the legal opinions rendered in this case.

V. REASONS FOR DENYING THE WRIT

Rule 17 of this court provides:

> "A review on Writ of Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons therefor."

The Rule goes on to describe "the character of the reasons" the Court will consider in passing on a petition for certiorari, such as: (1) conflicts in decisions between federal courts of appeal on the same issue; (2) wide departures by a federal court of appeals from the "accepted and usual course of judicial proceedings," and (3) a decision by the federal court of appeals on an important question of federal law which has not been, but should be, settled by this Court," or which "has decided a federal question in a way in conflict with applicable decisions of this Court."

When measured by the foregoing standards, the defects of the present Petition are both clear and fatal.

Simply stated, there are no special or important reasons why this Court should review the Pennsylvania trial court's dismissal of petitioners' personal injury action because that order and the appellate courts' affirmances thereof are in accord with all comparable federal and state decisions involving the interpretation and application of section 1605(a)(2) of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1605(a)(2).

The Pennsylvania courts interpreted FSIA properly when they concluded that the pivotal inquiry in determining whether or not the foreign entity is immune from suit in the United States is not whether the entity, here The Hotel Corporation of the Bahamas t/a The Ambassador Beach Hotel, engaged in <u>any</u> commercial activity in the United States but rather whether the cause of action <u>sub judice</u> is based on: 1)

reason for this Court's review; for the most part, petitioners dispute the courts' factual determination that the activity which relates to the cause of action was not carried on in the United States. Those factual and legal arguments have been reviewed by two trial courts and three appellate court panels on both the state and federal level without any variance in result[1].

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1 This petition arises out of two actions filed in the Court of Common Pleas of Philadelphia, Pennsylvania, No. 4638, July Term, 1983 and No. 4665, October Term, 1983, which suits are identical in substance but the latter action specifically names The Hotel Corporation of the Bahamas as a defendant. The original suit only identified The Ambassador Beach Hotel as a defendant, but was amended, without leave of court or agreement of the parties, to name The Hotel Corporation of the Bahamas. Plaintiffs have continued to litigate both actions notwithstanding their duplication. Thus, the trial court considered Preliminary Objections raising the FSIA jurisdictional immunity issue in both cases and entered orders in both on March 2, 1984 and May 22, 1984, respectively. Plaintiffs asked for reconsideration of both orders, which requests were denied by Honorable Alfred DiBona, Jr. on March 17, 1983 and June 12, 1984, respectively. All four orders were

Moreover, petitioners are presently litigating the merits of the personal injury case in the appropriate jurisdiction, i.e., the Commonwealth of the Bahamas. Thus, any remand or reopening of the underlying suit now would only result in multiple prosecution of the same action.

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1 (cont.)

independently appealed to the Pennsylvania Superior Court at Nos. 0977, 1055, 1056 and 1109, Philadelphia 1984.

After the dismissal of the Complaints, plaintiffs attempted to supplement the record with various extraneous matters concerning advertisements by entities other than the named defendant (e.g., advertisements by the Bahamian Ministry of Tourism -- a separate corporate entity) and activities by the Hotel Corporation in the United States that are entirely unrelated to the alleged tortious conduct involved in this action, by petitioning both the lower and appellate courts. In response, the Superior Court, by order dated December 20, 1984, remanded appeal Nos. 977, 1055, 1056, 1109 and 1792 ("Appeal I") to the trial court for the purpose of determining whether certain specifically identified documents should be made part of the record on appeal. Judge DiBona heard argument and reviewed briefs and ruled on February 6, 1985 that the evidence should not be included because it was irrelevant. Judge DiBona also entered a protective order

A. The Exception to Sovereign Immunity Set Forth in Clause 1 of Section 1605(a)(2) Is Not Satisfied by the "Minimum Contacts" Standard.

Federal and state courts have consistently held that the plain language of Clause 1 of §1605(a)(2) requires more than the "minimum contacts" long-arm jurisdiction standard; section 1605(a)(2) requires

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1 (cont.)

terminating any further discovery because plaintiff was still serving discovery requests notwithstanding the appeals and Pa. R.C.P. 1701(b). Those orders were appealed at Nos. 605 and 606 Philadelphia 1985 ("Appeal II").

On October 18, 1985, the Superior Court affirmed the lower court decisions in Appeal I. A Motion for Rehearing En Banc was denied on December 26, 1985. In a Memorandum Opinion dated December 30, 1985, the Superior Court also affirmed the lower court orders in Appeal II. Petitions for Allowance of Appeal with the Pennsylvania Supreme Court were filed at Nos. 61 and 79 E.D. Allocatur Docket 1986 relating to Appeals I and II, respectively. The Pennsylvania Supreme Court denied allocatur on October 2, 1986.

In parallel proceedings, petitioners filed identical federal court suits identical in form to the state complaints against the Commonwealth of the Bahamas and the Ministry of Tourism (Civil Nos. 84-5123, 85-1685, E.D. Pa.) which were

a nexus between the alleged commercial activity in the United States and the acts upon which the suit is filed. Vencedora Oceania Navigacion v. Compagnie Nation, 730 F.2d 195 (5th Cir. 1984); Gilson v. Republic of Ireland, 682 F.2d 1022 (D.C. Cir. 1982); Velidor v. UPG Benghazi; 653 F.2d 813 (3d Cir. 1981); Sugarman v. Aeromexico, 626 F.2d 270 (3d Cir. 1980).

Petitioners argue that the Pennsylvania courts have jurisdiction over respondents because the Hotel Corporation conducts some minimum commercial activity in the United States, i.e.; the maintenance of a mailing address in Coral Gables, Florida; the institution of an entirely unrelated collection action in the Court of Common Pleas of Philadelphia, Pennsylvania, and the lease of Pitney-

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1 (cont.)

also dismissed on the ground of sovereign immunity. The Third Circuit affirmed the dismissals on June 9, 1986 (No. 85-1709/1710 Third Circuit) (Opinion dsprinted as Appendix L to Petition).

Bowes postage machines. The fallacy of petitioners' argument is that these activities bear no nexus to the negligence alleged here.

In an attempt to cure this jurisdictional deficiency, petitioners argued in the appellate courts (notwithstanding the lack of factual averments in the pleadings to support the argument) that the advertising and promotional efforts of the Bahamian Government, through its Ministry of Tourism, a separate corporate entity, constitute tortious overpromotion and fraudulent misrepresentation[2]. Similar claims have been rejected consistently by the Courts. Tigchon v. Island of Jamaica, 591 F.Supp. 765 (W.D. Mich. 1984); Harris v. VAO Intourist Moscow, 481 F.Supp. 1056 (E.D.N.Y. 1979), aff'd. mem., 607 F.2d

2 This argument was also raised in petitioners' suit in federal court against the Bahamian Government and soundly rejected by the district court and third circuit. Tucker v. Whitaker Travel, Ltd., 620 F.Supp. 578, 584-85 (E.D. Pa. 1985) aff'd. unpublished opinion (reprinted as Appendix L to Petitioners' Petition).

Tigchon v. Island of Jamaica, supra, a wrongful death action arising out of a water-skiing accident at the Negril Beach Village, a resort hotel owned and operated by the foreign entity, is an analogous case. There, plaintiff argued that the defendant distributed travel literature at a Grand Rapids travel agency; that Negril Beach advertises in the United States, and that they maintained an authorized representative in the United States. The Court nonetheless dismissed the Complaint with the following explanation:

> In this case, the connections between defendant, plaintiff's injury, and the United States are even more remote than those in Harris and In re Air Disaster. Jamaica has expressly denied that Sunflight Tours is its agent or authorized representative. The travel brochure perused by plaintiff and her husband was published by the independent tour operator, Sunflight, and was not part of a systematic direct publicity campaign organized by Jamaica and conducted by Jamaica in the United States. Plaintiff apparently concedes that the distribution of promotional literature by an independent tour operator is a very slender reed upon which to found jurisdiction. Plaintiff states, at p. 9 of her brief,

> Regardless of whether Jamaica itself was doing the advertising or causing third parties to do so on its behalf, the advertising was intended to create 'substantial contacts' with the United States...

This statement inaccurately states the test for jurisdiction under section 1605. First, independent commercial activity of a third party is insufficient to establish jurisdiction. Yessenin-Volpin v. Novosit Press Agency, 443 F.Supp. 849 (S.D.N.Y. 1978). Second, in the regardless of "intended contacts, the foreign state is entitled to immunity and there is no jurisdiction.

Moreover, it cannot be said that plaintiff's cause of action is "based upon substantial contacts with the United States." The death of plaintiff's decedent is allegedly due to the negligent conduct of an employee of the Negril Beach Village accompanying plaintiff's decedent while water-skiing. Harris is directly on point, holding that the nexus between the plaintiff's death in a Moscow hotel, and the activities of the tour operator that arranged the visit were too attentuated to satisfy section 1605's requirements that the action be "based upon" contacts with this country. The Act clearly contemplates a direct connection between the injury suffered and the contacts with the United States. No such direct nexus exists between a one-line advertisement in a world-wide listing of hotels, an advertisement published by an independent tour operator, and the tragic death of Mr. Tigchon while water-skiing. Any links are simply too attenuated and indirect to satisfy the first clause of section 1605.

Id., at 767-8.

Likewise, in Harris v. VAO Intourist Moscow, supra, the Court expressly found that jurisdiction under Clause 1 of §1605(a)(2) must be keyed to activity in this country which is related or "linked" to the claim for relief. Based on this analysis of FSIA, the Court opined:

> The first clause of section 1605(a)(2) focuses upon actions arising from commercial activity within the United States. This is essentially a clause which deals with the transaction of individual business deals in the United States. It is not equivalent to the 'doing business' provisions described in II B., supra. The clause requires that the court action 'be based upon' the specific commercial activity carried on in the United States. It resembles the 'transaction' of business clauses used in many of the long arm provisions. See, e.g., Uniform Interstate and International Procedure Act §1.03(1), 9B Uniform Laws Annot. 310 (1966). The commercial activity out of which plaintiff's claim arises is the operation of the Hotel in Moscow; despite the apparent integration of the Soviet tourist industry, the relationship between the negligent operation of the National Hotel and any activity in the United States is so attenuated that this clause is not applicable. Even though defendants may be doing business here in the traditional sense, Frummer v. Hilton Hotels International, Inc., 19 N.Y. 2d 533, 536, 281 N.Y.S.2d 41, 43, 227 N.E.2d 851 (1967) (emphasis in original), cert.

> denied, 389 U.S. 923, 88 S.Ct. 241, 19 L.Ed.2d 266 (1967), there is no 'doing business' provision in the Act. This civil court action is not based upon commercial activity in the United States.

Id., at 1061.

Accordingly, the Harris court determined that Clause 1 of §1605(a)(1) did not apply.

In Vencedora Oceanica Navigacion v. Compagnie Nation, 730 F.2d 195, 202 (5th Cir. 1984), the Court, examining Clause 1 noted:

> We regard a nexus approach simply as a more effective means of carrying out the goal of requiring a connection between the lawsuit and the United States that the language of clause one appears to embody. A "doing business" test, on the other hand, focuses on the connection between the defendant and the United States; by definition it requires no specific connection between the lawsuit and the United States. Since, as the dissent notes, a "doing business" test is more controversial internationally than a nexus test, we think it likely that Congress specifically intended not to include "doing business" as one of the commercial activity exceptions, and did so in part through its restrictive wording of clause one. We note further that section 1605(a)(3), the expropriation exception, clearly embodies a "doing business" test, helps persuade us that Congress did not clearly include a "doing business" test among the commercial activity exceptions on purpose.

There is absolutely no evidence of record, or in the extra-record materials submitted by petitioners, that the Ambassador Beach Hotel or the Hotel Corporation of the Bahamas ever advertised, promoted, solicited business for or was in any way related to or affiliated with the Happy Trails horseback riding stable. The only evidence is that the Bahamian Tourist Office, an entirely separate entity, lists horseback riding as an activity available to vacationers on the islands. To entertain the notion that those descriptions by the Bahamian Tourist Office of sports facilities available on the islands could or should support jurisdiction over the respondents under one of the exceptions to FSIA because those materials were distributed in the United States is contrary to the language and spirit of the FSIA.

B. The Pennsylvania Courts Interpreted and Applied The "Direct Effects" Requirement of Clause 3 of §1605(a)(2) Properly.

The Pennsylvania courts' conclusion that the residual effects of the injuries petitioners sustained in the Bahamas do not constitute "direct effects" in the United States as that term is used in Clause 3 of §1605(a)(2), is consistent with every other court that has considered the issue. Yugoexport, Inc. v. Thai Airways Int'l., Ltd., 749 F.2d 1373, 1375 (9th Cir. 1984) cert. denied, ____ U.S. ____, 105 S.Ct. 2326 (1985); Australian Government Aircraft Factories v. Lynne, 743 F.2d 672 (9th Cir. 1984); Berkovitz v. Islamic Republic of Iran, 735 F.2d 329 (9th Cir. 1984) cert. denied, ____ U.S. _____, 105 S.Ct. 510 (1985); Zernicek v. Petroleos Mexicanos (Pemex), 614 F.Supp. 407, 413 (S.D. Tex. 1985); Keller v. Transportes Aereos Militares Ecuadorianos, 601 F.Supp. 787, 790 (D.D.C. 1985); Close v. American Airlines, 587 F.Supp. 1062

(S.D.N.Y. 1984); Dorrian v. Lucayan Bay Hotel, No. 80-1740 (E.D. Pa. Dec. 2, 1980) (unreported); Harris v. VAO Intourist Moscow, supra; Upton v. Empire of Iran, 459 F.Supp. 264 (D.D.C. 1978).

In Australian Government Aircraft Factories v. Lynne, supra, the Ninth Circuit reversed the District Court's finding that the death of a pilot and the damage to the plane overseas caused "direct effects" to the pilot's survivors and the California corporation which owned the plane. In Keller v. Transportes Aereos Miltares Ecuadorianos, supra, another wrongful death action, the Court arrived at the same conclusion.

In Berkovitz v. Islamic Republic of Iran, supra, the murder of an American citizen in Iran was held to have no "direct effect" in the United States upon which to predicate jurisdiction under Clause 3 of §1605(a)(2).

In Zernicek v. Petroleos Mexicanos (Pemex), supra, the District Court concluded that plaintiff's argument that the effects of radiation exposure did not manifest for a long period of time and, accordingly, the injurious effect occurred in the United States did not distinguish "the overwhelming weight of case authority" that it was not a "direct effect" in the United States.

Close v. American Airlines, supra, involved a personal injury action for injuries sustained when plaintiff was struck by the jet-wash of a nearby airplane as she was disembarking from her flight at the Kingston, Jamaica airport. The court dismissed the action, finding that personal injury elsewhere does not qualify as a "direct effect" in the United States to permit jurisdiction under Section 3.

In Dorrian, supra, the District court held that the injuries the plaintiff sustained in the Bahamas did not

constitute a direct effect in the United States "despite the fact that the injury which was suffered abroad continues to cause suffering and economic loss to plaintiff in the United States".

As stated above, the Harris case involved a death action brought on behalf of an American tourist who was killed in a fire in the National Hotel of Moscow. The Harris court also concluded that "indirect injurious consequences within this country of an out-of-state act are not sufficient contacts to satisfy the direct effect requirement of §1605(a)(2)." Harris, 481 F.Supp. at 1062.

In Upton v. VAO Intourist Moscow, supra, an American citizen was injured when part of the ceiling in the Teheran Airport collapsed. The court dismissed the plaintiffs' action for lack of jurisdiction pursuant to FSIA because of the lack of direct injury in the United States.

Petitioners fail to cite any case which concludes otherwise. They argue instead that courts involving cases of injury to corporate concerns are more liberal in the "direct effects" standard than they are to personal injury actions of individuals. The authority cited for this conclusion, Texas Trading and Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2d Cir. 1981), carefully reviewed, does not support such a conclusion. The monetary loss in Texas Trading was a direct, not a residual, effect. The inequity perceived by petitioners is not substantiated.

CONCLUSION

Petitioners' suggested interpretation of the Foreign Sovereign Immunities Act would permit any American citizen, injured anywhere in the world, as a result of negligence of a purely private business entity (such as a horseback riding stable) to sue the foreign government

because that government lured the American to the foreign land without expressly warning the citizen that there may be dangers lurking in the land. When it passed the Foreign Sovereign Immunities Act, Congress, as the Courts have consistently and correctly concluded, did not intend to open the door so broadly. Such an interpretation would emasculate the concept of sovereign immunity embodied in the Foreign Sovereign Immunities Act.

Respectfully submitted,

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